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In The

Supreme Court of the United States

October Term, 1998

ELLIOT NEUFELD, D.O., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Oregon v. Kennedy* should be revisited because its application has led to the result that even gross and intentional prosecutorial misconduct may never form the basis for a Double Jeopardy claim, so long as there is a finding that the prosecutor did not intend to goad the defendant into moving for a mistrial?

2. Whether, in determining the intent of the prosecutor in engaging in the misconduct which caused the mistrial, *Oregon v. Kennedy* requires that courts base their findings on the objective facts in the record, as opposed to a prosecutor's self-serving explanation for his misconduct?

3. Whether *Oregon v. Kennedy* requires that the court hold an evidentiary hearing to test the prosecutor's subjective, self-serving explanation for engaging in the misconduct which caused a mistrial?

4. Whether the Court of Appeals misinterpreted the standard enunciated in *Oregon v. Kennedy* by holding that it is the expected reaction of the court to the prosecutor's misconduct, not the expected reaction of the defendant to the misconduct, which guides the relevant inquiry on specific intent?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court of the Southern District of Ohio, *United States v. Neufeld*, No. 97-3159, 1998 WL 320985 (6th Cir. June 4, 1998), and the order denying the petitioners' timely petition for rehearing, *United States v. Neufeld*, No. 97-3159 (6th Cir. July 30, 1998), are set forth in the Appendix at 1 and 33.

The opinions of the United States District Court for the Southern District of Ohio denying petitioners' motion to dismiss the Indictment on grounds of Double Jeopardy, *United States v. Neufeld*, 949 F.Supp. 555 (S.D. Ohio December 17, 1996), and denying petitioners' motion for reconsideration, *United States v. Neufeld*, No. CR-2-94-144 (S.D. Ohio February 4, 1997), are set forth in the Appendix at 10 and 27.

The opinion of the United States District Court for the Southern District of Ohio granting petitioners' motion for a mistrial, *United States v. Neufeld*, No. CR-2-94-144 (S.D. Ohio, September 17, 1996), is set forth in the Appendix at 29. The transcript of the hearing before the district court on Defendants' motion for a mistrial and the district court's oral ruling granting a mistrial on September 17, 1996, is set forth in the Appendix at 35.

The opinion of the United States District Court for the Southern District of Ohio granting petitioners' motion to exclude all evidence of homosexual conduct (and ruling on other evidentiary issues), *United States v. Neufeld*, No. CR-2-94-144 (S.D. Ohio, June 26, 1996), is set forth in the Appendix at 60.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on June 4, 1998. The order of the United States Court of Appeals for the Sixth Circuit denying the petitioners' timely petition for rehearing was entered on July 30, 1998. This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. § 1254 and *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 2041-42, 52 L.Ed.2d 651 (1977) (order denying defendant's motion to dismiss indictment on Double Jeopardy grounds is a final, appealable decision). Rule 29.4(b) or (c) of this Court does not apply.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . .

STATEMENT OF THE CASE

In this case, the district court granted a mistrial on Defendants' motion based on a finding that the prosecutor had engaged in prejudicial misconduct which could not be remedied by an instruction to the jury. The misconduct consisted of the prosecutor intentionally eliciting

evidence regarding the homosexual conduct of the defendants – evidence which had been specifically excluded by a pretrial order of the district court. In its opinion granting the mistrial, the district court found that the prosecutor had "intentionally decided to begin the government's case with an inflammatory revelation about the defendants" and had "resorted to gratuitous sensationalism to help him win the case . . . " (App. 25; R. 176 at 16; J.A. 218).[1] Moreover, the court found that the prosecutor's proffered rationale for offering such evidence in light of the court's pretrial order was "objectively incorrect." (App. 22; R. 176; J.A. 215). Nevertheless, the district court later held that re-trial was not barred by the Double Jeopardy Clause of the United States Constitution pursuant to this Court's decision in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), because, although the misconduct was intentional, there was "insufficient evidence from which to infer that the prosecutor intended to provoke a mistrial when he introduced testimony that the defendants were [homosexual] lovers." (App. 25; R. 176 at 16; J.A. 218).

A. The Charges and Defendants' Motion in Limine

On September 20, 1994, a federal grand jury in the Southern District of Ohio returned a 30-count indictment

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[1] Citations to the Appendix to this Petition are cited as "App. ___" followed by the page number. Citations to the district court Record are designated as "R. ___," along with parallel citations to the Joint Appendix filed by the parties with the Sixth Circuit, which are designated as "J.A. ___" followed by the page number.

against Dr. Elliot Neufeld charging him with the offenses of conspiracy, solicitation of kickbacks, and mail fraud. Ten months later, the government returned a superseding indictment, also charging Jon Mickle, a mid-level manager at Caremark, in Count I of the Indictment which alleged that Dr. Neufeld and Mr. Mickle conspired to violate the Medicare-Medicaid Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). Dr. Neufeld and Mr. Mickle both entered pleas of not guilty.

Both Dr. Neufeld and Mr. Mickle are gay, and they had maintained a sexual relationship with each other for a period of time. In light of these facts, Defendants sought to exclude all evidence establishing homosexual conduct between Dr. Neufeld and Mr. Mickle on the grounds that such evidence was both irrelevant and extremely prejudicial. Thus, initially in correspondence with the government, the defendants asked the government to stipulate and agree:

> to the exclusion of any and all evidence of, and any and all reference to – whether specific, implied, or otherwise – any information concerning any alleged homosexual *conduct* between Dr. Elliot Neufeld and Mr. Jon Mickle.

(R. 95, Exhibit 4; J.A. 290) (emphasis in original).

The government responded to the proposed stipulations by faxing a letter to defense counsel stating that:

> The government is sensitive to the issues raised by the relationship between the defendants and will be mindful to that sensitivity. . . . Again, we

> will agree not to elicit testimony regarding specific instances of sexual conduct of the defendants without prior notice to defense and prior ruling by the court.

(R. 95, Exhibit 5 at 2; J.A. 300).

Subsequently, on March 12, 1996, the defendants filed an Omnibus Motion In Limine with a supporting memorandum of law in which "the Defendants move[d] the Court to exclude . . . evidence of homosexual conduct between the Defendants." (R. 95, Def. Motion at 1; J.A. 234). As to the issue of evidence relating to homosexual conduct, on June 26, 1996, the district court ruled as follows:

> B. Evidence of Homosexual Conduct
>
> Defendants do not object to the acknowledgment of sexual orientation or the friendship between Defendants Mickle and Dr. Neufeld. Defendants, however, move *in limine* pursuant to Fed.R.Evid. 401 and 403 to exclude specific instances of sexual conduct from introduction at trial. The Government replies that it "is sensitive to the issues raised by the relationship between the defendants . . . " and agrees "not to elicit testimony regarding specific instances of sexual conduct of the defendants without prior notice to defense and prior ruling by the court." *See* Def. Mot. Ex. 5 (3/4/96 letter to Defendants). The Government indicates its willingness not to introduce such evidence with one exception [the "Shevlin testimony"], and the Court will hold the Government to its position.

> The Court **Holds** that specific instances of sexual conduct will be precluded from trial.

(App. 61; R. 126 at 2-3; J.A. 339-40). The court then went on to rule that the "one exception" of sexually-related testimony which the government did seek to offer, *i.e.*, the Shevlin testimony, was also inadmissible, and specifically excluded that testimony as well. (App. 63-67; R. 126 at 3-8; J.A. 340-45).

These rulings, entered more than two months before trial, ended the parties' correspondence and litigation as to the admission of any evidence implicating homosexual conduct between the defendants. Any such evidence was expressly and unambiguously excluded from trial, both by the agreement of the government and the order of the court.[2]

B. The Government's Intentional Misconduct And The Court's Granting of a Mistrial

With this as prologue, on the afternoon of September 16th, after opening statements, the government called its first witness, Ms. Carolyn Sipes. (R. 188 at 666; J.A. 1333). After discussing her background and how she met the

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[2] Because the subject of Dr. Neufeld's and Mr. Mickle's homosexual relationship was so potentially inflammatory that it could prevent them from receiving a fair trial, it was also the primary focus of the parties during the jury selection process. Throughout that process the government repeatedly represented that the defendants' homosexuality and homosexual conduct was "not part of this case" (J.A. 850-51) and "not at issue in this case." (J.A. 897).

defendants, the prosecutor elicited the following testimony:

> Q. [By Mr. Michelich]: Were you aware of any special relationship between Elliot Neufeld and Jon Mickle?
>
> A. [By Ms. Sipes]: Yes, I was.
>
> Q. How did you know about it?
>
> A. Jon told me.
>
> Q. What did Jon tell you?
>
> A. He told me that they had been lovers.

(*Id.* at 686; J.A. 1353). Defense counsel immediately objected and requested a sidebar. (*Id.* at 686-87; J.A. 1353-54). The court overruled the objection and request for sidebar. (*Id.*). The prosecutor then elicited the following additional testimony:

> Q. Did Elliot Neufeld ever mention his relationship with Jon Mickle to you?
>
> A. Yes, he did.
>
> Q. What did he say?
>
> [Defense Counsel]: Can I have some foundation, please, Your Honor.
>
> The Court: Overruled.
>
> Q. What did Elliot Neufeld say?
>
> A. Elliot told me that they had been an item at one time.
>
> Q. Did you ever witness any arguments between Elliot Neufeld and Jon Mickle?

A. Yes, I did.

Q. Describe them, please, for the jury.

(*Id.* at 687; J.A. 1354). Defense counsel again objected and requested a sidebar, which the court granted. (*Id.*).

At the sidebar, the court requested the prosecutor to explain where he was going with this line of testimony. (R. 188 at 687-88; J.A. 1354-55). Contrary to his repeated representations to both the court and the defense prior to trial, the prosecutor now argued that sexual conduct between the defendants was highly relevant to this case in the form of sex as remuneration for referrals. (R. 188 at 687-92; J.A. 1354-59). The defense moved for a mistrial, citing the protracted litigation on this issue and the court's explicit order excluding evidence of homosexual conduct.

The next morning, in response to a direct inquiry by the court, the prosecutor admitted that he "fully expected" to elicit the "exact answer[s]" that prompted the mistrial motion. (App. 47; J.A. 1392). The court referred the prosecutor to the pretrial discussions and litigation on this subject, including: (1) the defendants' proposed stipulation to exclude evidence of homosexual conduct; (2) the government's promise not to elicit such testimony without advance notice and ruling; (3) the government's indication that it would not introduce such evidence, with the exception of the "Shevlin testimony" which was ruled inadmissible; (4) the Court's pretrial ruling that it would hold the government to its position; and (5) its pretrial ruling excluding evidence of specific instances of sexual conduct. (App. 48; J.A. 1392-93). The court then declared a mistrial. (App. 55-56; J.A. 1401-02)

("In sum, the Court finds that the introduction of evidence that the defendants are lovers is so unfairly prejudicial, that it must grant defendants' motion for mistrial").

C. Defendants' Double Jeopardy Claim

Following the mistrial, defendants moved to dismiss the indictment on the basis of Double Jeopardy, arguing that the objective facts and circumstances establish that the prosecutor intended to provoke defense counsel into moving for a mistrial. (R. 168; J.A. 401-456). The government contended that the prosecutor did not intend to cause the mistrial and that he elicited the subject testimony based on a belief that it did not violate either the parties' agreement or the court's order excluding testimony relating to homosexual conduct. (R. 170; J.A. 457-503). Specifically, the government asserted that the prosecutor drew a distinction between evidence that the defendants were "homosexual lovers" and evidence of "specific instances of sexual conduct." (R. 170 at 15; J.A. 471).

On December 17, 1996, the district court denied defendants' motion to dismiss the indictment based on the principles of double jeopardy. (App. 10; R. 176; J.A. 203-219). In denying the motion, however, the court found that the government was "clearly aware of the sensitivity" of the defendants and the court to any mention of specific homosexual conduct. (App. 20; R. 176 at 11; J.A. 213). The court also recognized that the prosecutor "intentionally decided to begin the government's case with an inflammatory revelation about the defendants"

and "resorted to gratuitous sensationalism to help him win the case . . . " (App. 25; R. 176 at 16; J.A. 218).

In deciding the central question of the prosecutor's intent, the court agreed with the defendants' construction of the objective record as to the validity of the prosecutor's claimed distinction. In this regard, the court found that the prosecutor's purported distinction was "objectively incorrect" because "testimony that the defendants were lovers implicates homosexual conduct." (App. 21-22; R. 176 at 12-13; J.A. 214-15). Nevertheless, the court found the prosecutor's proffered explanation to be a "colorable" claim which was "not per se without merit," and not "wholly implausible." (*Id.*). Based on these findings and the court's "firsthand observation" of the prosecutor – but in the absence of an evidentiary hearing on the issue – the district court found "the prosecutor's explanation of the basis for his elicitation of the prejudicial testimony to be credible." (App. 22; R. 176 at 13; J.A. 215). Once it made that finding and credited the prosecutor's claim, it concluded that the prosecutor's asserted "subjective belief that such a distinction could be drawn belies the defendants' contention that he intended to goad them into moving for a mistrial." (*Id.*). The court, therefore, denied defendants' motion to dismiss.

Defendants subsequently requested the court to reconsider its ruling, or at a minimum to order an evidentiary hearing regarding the issue of the prosecutor's intent in eliciting the testimony which caused the mistrial. (R. 177 and 180; J.A. 533-650). The court denied the motion for reconsideration without addressing the defendants' request for an evidentiary hearing.

On June 4, 1998, a panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's ruling on defendants' Double Jeopardy claims. (App. 1). In so doing, the Sixth Circuit panel concluded that it did not "think the prosecutor could have anticipated his questioning would have led to a mistrial" and, therefore, "there is no reason to think that he intended that his questioning would result in a mistrial." (App. 9). Thus, in reviewing the central issue of the prosecutor's intent, the Sixth Circuit focused on whether the prosecutor intended to achieve, or understood that the district court would order, an actual mistrial, and not on what the prosecutor understood or believed the reaction of the defendants would be to the improper evidence elicited.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for writ of certiorari to address the critically important question of the scope of the Double Jeopardy Clause in cases of intentional prosecutorial misconduct for which there is no remedy short of granting a mistrial. In holding that the applicability of the Double Jeopardy Clause hinges solely on a determination that the prosecutor had the specific intent to goad a mistrial, this Court's decision in *Oregon v. Kennedy*, 456 U.S. 667 (1982) imposed a new and severe restriction on the protections of the Double Jeopardy Clause which had previously been recognized. As Justice Stevens noted in his concurring opinion, the holding in *Kennedy* effectively "lop[ped] off" a portion of the Double Jeopardy jurisprudence previously announced by this Court. *Kennedy*, 456 U.S. at 681 (Stevens, J. concurring

in result but not reasoning of majority opinion, joined by Brennan, Marshall, and Blackmun, JJ.).

The Double Jeopardy Clause was designed to protect defendants from the harms resulting from multiple prosecutions for the same offense. The harms suffered by a defendant are no less in cases where the prosecutor intends to obtain a wrongful conviction or avoid an acquittal by intentionally eliciting improper and highly prejudicial evidence, than they are in cases where the prosecutor has the specific intent to goad a mistrial. Thus, the fundamental distinction drawn in *Kennedy* is without foundation in the underlying purpose of the Clause itself.

In addition, the standard applied by the Sixth Circuit – *i.e.*, determining the prosecutor's intent vis-a-vis the reaction to his misconduct by the court rather than by the defendants – conflicts with the mandate of *Kennedy*. Finally, under *Kennedy*, the intent of a prosecutor in engaging in misconduct sufficient to command a mistrial must be determined by the objective record, not subjective credibility evaluations of the prosecutor, untested through an evidentiary hearing, as occurred in this case.

A. Background: Legal Principles Governing Double Jeopardy Claims Following Mistrials Caused by Intentional Government Misconduct.

The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. This double jeopardy interest of a defendant includes "being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn*, 400 U.S. 470, 486, 91 S.Ct.

547, 558, 27 L.Ed.2d 543 (1971). Therefore, this Court has recognized that "one of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury empaneled to try him." *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 2088, 72 L.Ed.2d 416 (1982). Where the prosecutor intentionally injects improper, inflammatory evidence which would deprive the defendant of a fair trial, the Court has recognized that the defendant "face[s] a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial . . . prosecutorial error." *United States v. Dinitz*, 424 U.S. 606, 609, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). Thus, when a mistrial has been declared based upon the misconduct of the prosecutor, "the defendant's 'valued right to have his trial completed by a particular tribunal' is also implicated." *Dinitz*, 424 U.S. at 606, quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949). Otherwise, "the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances." *Kennedy*, 456 U.S. at 673, 102 S.Ct. at 2088.

Prior to its decision in *Kennedy*, this Court had addressed the applicable standards to be applied to Double Jeopardy claims when prosecutorial misconduct deprives the accused of his "valued right" to his first jury. The leading cases prior to *Kennedy* indicated that a retrial might be barred if the mistrial was due to prosecutorial

"overreaching,"[3] "harassment" of the defendant,[4] or actions of the prosecutor which were intended to provoke a mistrial.[5] Consistent with this jurisprudence, in *Dinitz*, this Court held that the Double Jeopardy Clause

> protect[s] a defendant against governmental actions intended to provoke mistrial requests. . . . It bars retrials where "bad-faith conduct by judge or prosecutor" threatens the "harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.

Dinitz, 424 U.S. at 611 (citations omitted). Thus, it was clear prior to *Kennedy* that the motivation behind prosecutorial misconduct which might give rise to the protection of the Double Jeopardy Clause was not limited to instances where the prosecutor "intended to provoke mistrial requests," but also included misconduct evidencing "bad faith" on the part of the prosecutor, "harassment" of the defendant, and other improper "overreaching" which deprived the defendant of his valued right to have his trial completed by a particular tribunal. Although not in the form of a bright-line test, these cases provided a workable standard for application of this important Constitutional protection.

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[3] *Jorn, supra*, 400 U.S. at 485.

[4] *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963).

[5] *Cf., United States v. Tateo*, 377 U.S. 463, 468 n.3, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964).

B. The Standard Announced by This Court in *Oregon v. Kennedy* Should Be Revisited Because It Too Severely Restricts Application of the Double Jeopardy Clause in Cases of Intentional Prosecutorial Misconduct Causing a Mistrial

In *Kennedy*, the Court attempted to remove the uncertainty with regard to application of the Double Jeopardy Clause to cases involving mistrials caused by prosecutorial misconduct. Thus, in the majority opinion,[6] the Court rejected the use of the more general standards of prosecutorial bad faith, harassment or overreaching, as discussed above, opting instead for a standard based on a determination of the specific intent of the prosecutor. Thus, the Court held that:

> the circumstances under which . . . a defendant may invoke the bar of double jeopardy in a second effort to retry him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

Id. at 679.

In adopting this standard, the Majority expressly recognized that "a standard that examines the intent of the

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[6] Five Justices joined the majority opinion. The other four Justices concurred in the result, but rejected the reasoning underlying the majority opinion, including specifically the adoption of the "specific intent" standard by the Majority, as discussed *infra*. Significantly, Justice Powell, who cast the fifth and deciding vote for the Majority, did so subject to a separate concurring opinion that was based on just the concern raised here by the Defendants.

prosecutor" is "certainly not entirely free from practical difficulties." *Id.* at 675. But the Majority believed it was a more manageable standard to apply because it would be based on *objective* factors. *Id.*[7] Thus, *Kennedy* specifically limited the application of the Double Jeopardy Clause to a single circumstance: that in which the defendant can sustain the burden of proving that the prosecutor engaged in the recognized misconduct with the specific intent "to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 679.

In a concurring opinion joined by three other Justices, Justice Stevens sharply criticized the adoption of the prosecutorial intent standard in part because it placed too high a burden on a defendant. *Id.* at 688. As Justice Stevens stated, "It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant." *Id.* Justice Stevens argued for a standard whose application by the lower courts would not hinge upon a single subjective finding of "specific intent," but one informed in individual cases by such things as findings of "deliberate misconduct" by the prosecutor, and that such misconduct has "rendered unmeaningful the defendant's choice to continue or to abort the proceeding." *Id.* at 689. Justice Stevens noted that the Court "repeatedly has shunned

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[7] Justice Powell's concurring opinion acknowledged the practical difficulty of applying the prosecutorial intent standard adopted by the Majority. Justice Powell emphasized that lower courts must focus on the *objective* record in assessing the prosecutor's intent. *Id.* at 679-80.

inflexible standards [such as that adopted by the Majority in *Kennedy*] in applying the comparable 'manifest necessity' exception" to the Double Jeopardy rule. *Id.* at 690-91. Justice Stevens stated:

> The value of the overreaching standard, like 'the value of the manifest necessity standard, thus lies in its capacity for informed application under widely different circumstances without injury to defendants or to the public interest.' *Wade v. Hunter*, 336 U.S. 684. . . . The scarcity of cases in which the exception has been invoked counsels against pre-empting the judgment reflected in our decisions that an exception for overreaching or harassment should remain available for the rare case in which it may be needed.

Kennedy, 456 U.S. at 691 (Stevens, J. concurring) (footnote and internal brackets omitted).

Nothing in either the Majority opinion or Justice Powell's concurrence suggests that the *Kennedy* Court intended to do away with claims of Double Jeopardy in all cases where intentional prosecutorial misconduct has caused a mistrial. That said, in warning against the narrow "specific intent" interpretation adopted by the Majority, Justice Stevens predicted that it would "eviscerate the exception [barring retrial where a mistrial is ordered because of prosecutorial misconduct]." *Kennedy*, 456 U.S. at 688 (Stevens, J., concurring). Justice Stevens was prophetic. In practice, the *Kennedy* standard focusing on proof of the prosecutor's subjective motivation has placed an unsustainable burden upon defendants challenging the inherently unknowable motivations of a prosecutor. *See Kennedy*, 456 U.S. at 688 (Stevens, J.

concurring). The extraordinarily narrow threshold announced in *Kennedy* has done just what Justice Stevens warned against: it has "eviscerate[d]" the defendant's right to assert a Double Jeopardy defense based on a prosecutor's intentional misconduct which causes a mistrial.[8] *Id.* at 688.

Moreover, under *Kennedy*, a prosecutor engaging in calculated, intentional misconduct which causes a mistrial can be relieved of any and all consequence from such conduct merely by convincing the court that his or her intent was anything other than specifically to goad the defense into moving for a mistrial, regardless of whether that alternative motivation is improper, unethical or illegal. Thus, a prosecutor whose admitted intent in engaging in misconduct was, for instance, to convict the defendant on impermissible evidence; or to harass the defendant; or to overcome deficiencies in his or her case by injecting inflammatory and prejudicial evidence into the trial, *see Kennedy*, 456 U.S. at 686-689 (Stevens, J., concurring), is impervious to the defendant's subsequent Double Jeopardy motion under *Kennedy*. The Double Jeopardy Clause cannot be rendered impotent against such forms of intentional prosecutorial misconduct and still retain its essential substance and meaning. The extreme limitation of a defendant's fundamental Constitutional right against Double Jeopardy imposed by *Kennedy* is unwarranted, and cannot withstand scrutiny under the light of the history and cardinal purpose of the

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[8] In the sixteen-plus years following the decision in *Kennedy*, not a single federal court has found this standard to have been met.

protection against Double Jeopardy afforded in the Constitution.[9]

C. The *Kennedy* Standard Has Been Rejected By The Highest Courts of Several States Interpreting Identical Double Jeopardy Provisions

This inherent infirmity in the *Kennedy* standard discussed by Justice Stevens has not gone unnoticed. Indeed, in the context of interpreting identical double jeopardy provisions in their own constitutions, the highest courts of several states have rejected *Kennedy* based on its narrow "specific intent" standard, and have adopted a standard consistent with the reasoning in Justice Stevens' concurring opinion, beginning with the Oregon Supreme Court on remand of the *Kennedy* case. *State of Oregon v. Kennedy*, 666 P.2d 1316 (Ore. 1983) (retrial barred where prosecutor consciously chooses to engage in prejudicial misconduct requiring mistrial, regardless of proof of specific motive). *See also, State v. Breit*, 930 P.2d 792, 797 (N.M. 1996) ("One of the most persuasive criticisms of the *Kennedy* rule is that the subjective intentions of the prosecutor are inherently unknowable."); *Bauder v. State*, 921

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[9] In fact, the *Kennedy* standard is contrary to the " 'important consideration, for purposes of the Double Jeopardy Clause' ": that is, "that the Defendant retain primary control over the course to be followed." *Kennedy*, 456 U.S. at 676 (citation omitted). Instead, the *Kennedy* standard puts control in the hands of the prosecutor, who is now free under all but one circumstance (*i.e.*, specific intent to goad a mistrial), to present a defendant with the Hobson's choice of retrial or trial against intolerably unfair evidence.

S.W. 696, 699 (Tex. 1996) ("conditions under which retrial is barred will generally be clearer when the prosecutor's subjective intent is not an issue"); *Pool v. Superior Court*, 677 P.2d 261, 271 (Az. 1984) ("We agree with the opinion of Justice Stevens for the four-member minority that so specific an intent must necessarily involve a subjective inquiry and is too difficult to determine."); *State v. White*, 354 S.E.2d 324, 328-29 (N.C. 1987) (agreeing with Justice Stevens' concurring opinion that subjective intent is too difficult to prove); *People v. Dawson*, 397 N.W.2d 277, 282 (Mich. 1986) (subjective intent standard places unreasonable burden on defendant). Thus, the rule announced in *Kennedy* has led to a growing disparity between the interpretation of the Double Jeopardy Clause of the United States Constitution with the interpretation of identical provisions of various state constitutions.

In *Pool*, the Arizona Supreme Court reasoned that in cases of prosecutorial misconduct leading to a mistrial, there will always be a whole host of possible (and plausible) motivations for the prosecutor to have elicited the improper evidence. "He may have sought to avoid a serious danger of acquittal by using whatever method was available to convict, proper or improper. He may have intended to harass the defendant without thought of the risk of mistrial because of anger at either defendant or defense counsel. He may have simply intended to retaliate for what he perceived as improper conduct of defense counsel, no matter what the risk of mistrial." *Pool*, 677 P.2d at 270. Yet under *Kennedy*, only if the court finds that the prosecutor engaged in the misconduct with the specific intent of causing a mistrial is such conduct implicative of the Double Jeopardy Clause. Consistent

with the reasoning of Justice Stevens' concurrence, the court in *Pool* held that the singling out of but one improper motivation which may provide the foundation for a claim of double jeopardy (*i.e.*, the intentional goading of defendant into moving for a mistrial), to the exclusion of all other improper motivations (*e.g.*, to wrongfully convict, to harass, or to avoid acquittal by injecting improper and prejudicial evidence, etc.) is a distinction without a Constitutionally significant difference.

Thus, in contrast to *Kennedy*, the *Pool* court adopted a three-part test, holding that the double jeopardy clause of the Arizona Constitution bars retrial after a mistrial when:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and

2. Such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and

3. The conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool, 677 P.2d at 271-72 (footnote omitted). The court found that when these conditions are met, "the State has intentionally exposed the defendant to multiple trials for the same crime and has destroyed his expectation of completing the proceeding before the original tribunal.

This is exactly what the double jeopardy provision was intended to prevent." *Id.* at 272.

Other courts, as well, have pointed out the Constitutionally inconsequential distinction between prosecutorial misconduct which is intended to provoke a mistrial, and that which is merely intended to irreparably prejudice the defendant. As the Michigan Court of Appeals noted,

> [T]he purpose of the double jeopardy clause is not to penalize the state, but to protect individuals against prosecutorial harassment. Such harassment can arise not only when a prosecutor intentionally provokes a mistrial, but can also arise when the prosecutor willingly and consciously engages in conduct which he knows is prejudicial, and which cannot be cured by means short of a mistrial, even if he is indifferent to the probability of a mistrial. Under either circumstance, the result is that prosecutorial impropriety forces the defendant to choose between completing a tainted trial or aborting it. In either situation, the burden of a second trial is not attributable to the defendant's preference for a new trial, but to the state's readiness to force him to make that choice. (Citation omitted) It follows that a defendant placed in either situation should be protected by the prohibition against double jeopardy. The United State's Supreme Court's *Kennedy* subjective intent standard does not permit such a result.

People v. Dawson, 397 N.W.2d 277, 282 (1986).[10] The Michigan court went on to adopt the three-part test outlined in *Pool* (discussed above). *Dawson*, 397 N.W.2d at 283.

Likewise, in *Bauder v. State of Texas*, 921 S.W.2d 696 (1996) *en banc*, the Court of Criminal Appeals of Texas rejected *Kennedy*'s dispositive focus on the "specific intent" of the prosecutor, holding that "the prosecutor's specific intent is [not] a relevant aspect of the [double jeopardy] inquiry." *Id.* The *Bauder* court explained:

> For example, when a prosecuting attorney, believing that he cannot obtain a conviction under the circumstances with which he is confronted, and given the admissible evidence then at his disposal, deliberately offers objectionable evidence which he believes will materially improve his chances of obtaining a conviction, and the law considers the prejudicial effect of such objectionable evidence to be incurable even by a firm judicial admonishment to the jury, it seems to us that the prosecutor's specific intent, whether to cause a mistrial or to produce a necessarily unfair trial or simply to improve his own position in the case, is irrelevant. In our view, putting a defendant to this choice, even

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[10] In addition, the *Dawson* court noted, again consistent with Justice Stevens' concurring opinion in *Kennedy*, that the *Kennedy* subjective intent standard "places upon the defendant the near impossible burden of proving the prosecutor's intent." *Id.*; *Kennedy*, 456 U.S. at 688 ("It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant") (Stevens, J., concurring).

> recklessly, is constitutionally indistinguishable from deliberately forcing him to choose a mistrial.

Bauder, 921 S.W.2d at 699.

The various state court interpretations of their double jeopardy clauses discussed above are consistent both with the federal standard as it existed pre-*Kennedy* (*see, Jorn* and *Dinitz*), and the history and purpose of the Double Jeopardy Clause itself. As the Court stated in *Jorn*, reprosecution after a mistrial has been declared by the trial court "subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action." *Jorn*, 400 U.S. at 483. So, too, the detriment to the defendant in cases involving mistrials resulting from prosecutorial misconduct is identical "regardless of the motivation" underlying the prosecutor's misconduct. "[I]n this area, bright-line rules based on either the source of the problem or the intended beneficiary of the [mistrial] ruling would only disserve the vital competing interests of the Government and the defendant [under the Double Jeopardy Clause]." *Jorn*, 400 U.S. at 486.

D. The Sixth Circuit Has Misinterpreted *Kennedy* By Focusing on the Expected Reaction of the Court, Rather Than That of the Defendants, to His Misconduct.

In affirming the district court's denial of the defendants' motion to dismiss the indictment on grounds of Double Jeopardy, the Sixth Circuit erroneously focused on whether the prosecutor intended that his elicitation of

the improper evidence would provoke the court into ordering an actual mistrial, and ignored the prosecutor's intent with regard to the defendants' reaction to the improper testimony. The Sixth Circuit emphasized this point, stating that the fact that the prosecutor "did not defer to the defendants' wishes, or even to their understanding of the pretrial order, is simply unimportant." (App. 9). That reasoning, however, evidences a misunderstanding and misapplication of the standard announced in *Kennedy*.

In *Kennedy*, the Supreme Court expressly and unambiguously stated that in this context the standard is whether "the conduct giving rise to the successful motion for a mistrial was intended *to provoke the defendant into moving for a mistrial.*" 456 U.S. at 674 (emphasis added). Accordingly, under *Kennedy*, the proper inquiry is whether the prosecutor knew or understood what the *defendants'* reaction would be to the introduction of the improper testimony, *not* how the *district court* would or should eventually rule. *Id.* That rule makes overwhelming sense, since what is at issue is whether, in effect, the defendant has waived his or her right to be tried by the first jury empaneled. The Sixth Circuit's approach here is in conflict with the standard announced in *Kennedy*, and this Court should grant this petition to avoid this type of misapplication of *Kennedy* from recurring.

E. The Lower Court Failed to Comply With The Dictates of *Kennedy* in Basing its Finding of the Prosecutor's Intent on a Subjective Credibility Finding Rather Than the Objective Record, And in the Absence of an Evidentiary Hearing on the Issue.

As discussed above, *Kennedy* requires that courts "infer[ ] the existence or nonexistence of intent [on the part of the prosecutor] from objective facts and circumstances." *Kennedy*, 456 U.S. at 675; *id.* at 679-80 (Powell, J. concurring) ("because 'subjective' intent often may be unknowable, I emphasize that a court – in considering a double jeopardy motion – should rely primarily upon the objective facts and circumstances of the particular case").

Contrary to the direction of the *Kennedy* court, the district court did not infer the prosecutor's intent from the objective facts and circumstances of record.[11] Rather, the district court brushed over the objective evidence and simply accepted as true the prosecutor's unsworn assertions that he drew a distinction between evidence that the defendants were homosexual lovers and evidence of homosexual "conduct," even though the court found this proffered distinction to be "objectively incorrect." (App. 22; R. 176 at 11-13; J.A. 213-15). In other words, the court denied the motion to dismiss based primarily, if not exclusively, on a single subjective credibility determination, not the objective facts and circumstances.

Under *Kennedy*, the court's analysis must focus on an analysis of the objective facts and circumstances. At a

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[11] *See, e.g.*, R. 168, Def. Mem. at 7-23; J.A. 408-424; R. 172, Def. Reply at 4-13, 14-18; J.A. 507-516; 517-521.

minimum, where the court makes a credibility finding inconsistent with the objective evidence, it should account for the objective evidence to the contrary. In this case, the court's finding that the prosecutor's explanation was "objectively incorrect" (App. 22; R. 176 at 13; J.A. 215) evinces the court's own agreement that the objective facts support a finding of prosecutorial intent to provoke a mistrial. The court, however, rested its finding on a subjective determination and failed to discuss, account for, or analyze the import of the objective evidence which militates against that finding.

The district court further distorted the process by making its findings with regard to the prosecutor's intent and credibility in the absence of an evidentiary hearing. The court's failure to conduct an evidentiary hearing was in contrast to appellate decisions from its own circuit. *E.g., United States v. White*, 914 F.2d 747, 752-53, n.1 (6th Cir. 1990) (evidentiary hearing called for "if there existed a genuine issue . . . concerning the prosecutor's intent").

Whatever the proper standard in cases like this, a defendant's Double Jeopardy rights should not be eclipsed by a credibility determination based on the subjective and self-serving statements of the prosecutor who committed the misconduct, and untested by cross-examination in an adversary proceeding.

F. The Question Presented Is Important

This Court should issue the writ of certiorari in this case because the issues raised in the petition are of grave importance. The issues frequently arise and are common

in criminal prosecutions. Both the Framers in drafting the Constitution, and this Court in interpreting it, have recognized the importance of protecting defendants from abusive, repetitive prosecutions. Thus, the Double Jeopardy Clause of the Fifth Amendment provides a fundamental right to the citizenry which protects them from abusive, harassing and oppressive conduct on the part of the government in pursuing criminal prosecutions. Prosecutors who commit intentional misconduct of such seriousness that it commands a mistrial should not be afforded shelter under the Clause.

As noted above, cases in which prosecutorial misconduct rises to the level necessary to implicate the Double Jeopardy Clause may not be everyday occurrences. But the current rule under *Kennedy* has created a breach in the Double Jeopardy Clause through which all type and manner of intentional prosecutorial misconduct (save that which is specifically intended to goad a mistrial) may now freely pass. The Double Jeopardy Clause should not be turned on its head to create a safe haven for prosecutors who, although bent on intentionally exposing the jury to irreparably prejudicial and improper evidence through purposeful misconduct, do so with the intent merely to convict the defendant on inflammatory and irrelevant evidence, rather than to "goad" the defendant into moving for a mistrial. The rule announced in *Kennedy*, however, allows for just that result and is, therefore, inconsistent with the fundamental mandate and purpose of the Double Jeopardy Clause.

The interpretation of the Double Jeopardy Clause suggested herein is consistent not only with the text and

historical purpose of the Clause, but also with the decisions of this Court prior to *Kennedy*, including the general proscription against prosecutorial misconduct embodied in a decision of this Court rendered more than 60 years ago in which it stated:

> [the prosecutor] may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Where a court determines (1) that the prosecutor has engaged in misconduct; (2) that such misconduct was intentional and pursued for an improper purpose; and (3) that the effect of the intentional misconduct is so compelling that no remedy short of a mistrial will suffice, the Double Jeopardy Clause of the Fifth Amendment must be implicated. We respectfully suggest a return to the standard which was in place prior to the narrowing decision in *Oregon v. Kennedy* based on this Court's decisions prior to *Kennedy* and consistent with the three-part test outlined in *Pool*, as discussed above. At a minimum, the *Kennedy* standard must be clarified to give guidance to the lower courts regarding the appropriate method of analysis in these cases.

CONCLUSION

For the reasons stated herein, Petitioners respectfully pray that a writ of certiorari issue in this case.

Respectfully submitted,

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No. 97-3159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELLIOT NEUFELD, D.O., and JON MICKLE,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Ohio

(Filed Jun. 4, 1998)

BEFORE: RYAN, DAUGHTREY, and LAY,* Circuit Judges.

RYAN, Circuit Judge. During the trial of defendants Elliot L. Neufeld, D.O., and Jon Mickle on Medicare fraud charges, the defendants moved for a mistrial on the basis of questioning by the assistant United States attorney designed to elicit testimony that Dr. Neufeld and Mickle were homosexual lovers. The district court ruled that the questioning violated a pretrial order *in limine*, and granted the motion. The defendants now appeal the district court's subsequent denial of their motion to dismiss the indictment on the ground of double jeopardy. Satisfied that we have jurisdiction over this interlocutory appeal, *see In re Ford*, 987 F.2d 334, 338 n.1 (6th Cir. 1992), we shall affirm.

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* The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

I.

In 1994, Dr. Neufeld had a general family medical practice, and Mickle was a registered nurse in low-level management positions at Caremark, Inc., a home health-care company. The government then charged Dr. Neufeld and Mickle with conspiring, between 1991 and 1994, to violate what is known as the Medicare/Medicaid anti-kickback statute, 42 U.S.C. §§ 1320a-7b(b); it also charged Dr. Neufeld with soliciting and receiving remuneration in violation of the same statute. The statute prohibits health-care providers from receiving or offering "any remuneration . . . for referring" patients to health-care services for which Medicare or Medicaid pays. In essence, the government's theory is that Caremark, through Mickle, paid Dr. Neufeld for referring his patients to Caremark for health-care services. Caremark pleaded guilty in a separate prosecution to one count of mail fraud, in violation of 18 U.S.C. § 1341.

Dr. Neufeld and Mickle are homosexual, and were involved in a sexual relationship for some unspecified period of time during the course of the conspiracy. Throughout this prosecution, the defendants' homosexuality has been a recurring issue. For example, the defendants voiced their concern to the district court that their homosexuality would "inflame the jury" and result in an unfair trial. During the *voir dire* of individual jurors that took place in the district judge's chambers, the defendants again made no secret of their homosexual status, and inquired of prospective jurors whether that status would bias the jurors. Indeed, during opening statements, defense counsel referred to the defendants' homosexuality. But while Mickle's attorney described the

defendants as "friends," the defendants never mentioned to the jury the fact of their past sexual relationship.—

Prior to trial, the defendants filed a motion *in limine* relating to, among other things, "evidence of homosexual conduct." The district court described the parties' positions as follows:

> Defendants do not object to the acknowledgement [sic] of sexual orientation or the friendship between Defendants Mickle and Dr. Neufeld. Defendants, however, move *in limine* pursuant to Fed. R. Evid. 401 and 403 to exclude specific instances of sexual conduct from introduction at trial. The Government replies that it "is sensitive to the issues raised by the relationship between the defendants" and agrees "not to elicit testimony regarding specific instances of sexual conduct of the defendants without prior notice to defense and prior ruling by the court." The Government indicates its willingness not to introduce such evidence . . . and the Court will hold the Government to its position.
>
> The Court **Holds** that specific instances of sexual conduct will be precluded from trial.

(Footnote omitted.) A central dispute in this appeal is the meaning of the phrase, "specific instances of sexual conduct."

At trial, the government called as its first witness Carolyn Sipes, a registered nurse and former Caremark employee. At the very inception of his direct questioning, the prosecutor began a line of inquiry that became the basis for the mistrial motion:

Q. Were you aware of any special relationship between Elliot Neufeld and Jon Mickle?

A. Yes, I was.

Q. How did you know about it?

A. Jon told me.

Q. What did Jon tell you?

A. He told me that they had been lovers.

MR. MC NALLY: Objection, your Honor. We request a side bar.

THE COURT: Overruled.

Q. Did Elliot Neufeld ever mentioned [sic] his relationship with Jon Mickle to you?

A. Yes, he did.

Q. What did he say?

MR. POULOS: Can I have some foundation, please, Your Honor?

THE COURT: Overruled.

Q. What did Elliot Neufeld say?

A. Elliot told me that they had been an item at one time.

Q. Did you ever witness any arguments between Elliot Neufeld and Jon Mickle?

A. Yes, I did.

Q. Describe them, please, for the jury.

MR. POULOS: I object. I request a side bar as to this particular area of testimony.

THE COURT: All right.

The court then inquired of the AUSA "where [he was] going" with this line of questioning. The AUSA responded as follows:

> The question, Your Honor, is: Was [sic] there any arguments?
>
> And the answer that I hoped to hear is: Yes, there were arguments because at one time – in fact, there were several instances – but the one in question has to do with the fact that Jon Mickle was dating Mike Federer and at that point Elliot Neufeld said: I am going to refer my patients elsewhere.
>
> It goes directly to his motivation to refer his patients to Caremark.
>
> . . . .
>
> . . . This goes directly to motive and it is very important because every time Elliot Neufeld asked for something, or every time he got angry, he threatened to refer his patients elsewhere.

In response, the defense made a motion for mistrial on the ground that the prosecutor's question put in issue homosexual conduct, rather than mere status, contrary to the court's *in limine* ruling. The district court took the motion under advisement.

In a hearing the next day, the defendants took the position that in excluding evidence of specific instances of sexual conduct, the district court's pretrial ruling extended to evidence that the defendants were lovers. The prosecutor took the position, just as it would be if the defendants were a man and a woman, that the fact that

they were lovers was relevant and nonprejudicial; further, he contended, Mickle's lawyer had all but said the two were lovers in his opening statement, when he referred to them as "friends." Finally, the AUSA argued, a statement that people were "lovers" did not amount to a statement about "specific instances" of sexual conduct, and thus the questioning at issue had not violated the pretrial order.

The district court granted a mistrial, and directed that the parties brief any double-jeopardy issues. The court subsequently denied the defendants' motion to dismiss the indictment on double-jeopardy grounds, concluding that the prosecutor had not deliberately attempted to goad the defendants into moving for a mistrial. *See United States v. Neufeld*, 949 F. Supp. 555 (S.D. Ohio 1996). The court specifically found "the prosecutor's explanation of the basis for his elicitation of the prejudicial testimony to be credible," and concluded, "[b]ased on its firsthand observation of the prosecutor's conduct and demeanor, that the prosecutor elicited the testimony out of an overzealous desire to convict."

II.

We conduct *de novo* review of a district court's denial of a motion to dismiss an indictment on the grounds of double jeopardy. *In re Ford*, 987 F.2d 334, 339 (6th Cir. 1992). At the same time, a district court's finding regarding the intent of the prosecutor to cause a mistrial is a finding of fact, *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982), and this court will "accord[ ] great deference" to such finding, "as the district judge [is] in the best position to

observe the conduct in question in the context of the entire trial," *United States v. White*, 914 F.2d 747, 752 (6th Cir. 1990).

III.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," U.S. CONST. amend. V, and it "protects a criminal defendant from repeated prosecutions for the same offense," *Kennedy*, 456 U.S. at 670. However, when "a mistrial [is] declared at the behest of the defendant," the usual rule is that the government is not precluded from retrying him. *Id.*

"[T]here is," however, "a narrow exception to th[is] rule," *id.* at 673, and it is one that is implicated by this case. The Supreme Court has "recognized . . . that there would be great difficulty in applying such a rule where the prosecutor's actions giving rise to the motion for mistrial were done 'in order to goad the [defendant] into requesting a mistrial.' " *Id.* (citation omitted). The Court explained the exception as follows:

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial *absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.* A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." . . . Only where the governmental

> conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Id. at 675-76 (emphasis added); *see White*, 914 F.2d at 752.

The defendants contend that the prosecutor's explanation for his behavior – that he drew a distinction between evidence of a homosexual relationship and evidence of specific instances of homosexual conduct – is not credible in light of the history of the parties' discussion of this issue, because the defendants consistently asked to exclude evidence that even implied a sexual relationship between the defendants; further, they basically contend, the distinction is a bad one – "pure sophistry," in their words. Since the prosecutor's position is implausible, they reason, the court can surmise that he is hiding his true intent, and can further surmise that his true intent must have been to provoke a mistrial.

We find it significant that the district court originally admitted this testimony, over the defendants' objections. This fact strongly suggests that the testimony did not strike the district court as being so out-of-bounds as the defendants now contend.

Of additional significance is the fact that the district court never explicitly ruled, until the order granting the mistrial, that "specific instances of sexual conduct" needed to be excluded because they were more substantially prejudicial than probative. Fed. R. Evid. 403. It simply relied on the government's representation that it would not attempt to introduce those matters. Therefore,

it cannot fairly be said that the government was on notice that the court viewed "specific instances" as unduly prejudicial – and it certainly cannot be said that the government should have known that extensions of that concept would be treated as unduly prejudicial.

While the issue of whether a mistrial was appropriate is not directly before the court, the fact that a mistrial was not an obvious necessity is nonetheless relevant to a consideration of the prosecutor's intent in pursuing his line of inquiry. We believe that the prosecutor's questioning was in compliance with the court's pretrial order; the fact that the government did not defer to the defendants' wishes, or even to their understanding of the pretrial order, is simply unimportant. Viewed objectively, we do not think the prosecutor could have anticipated his questioning would have led to a mistrial; there is no reason to think, therefore, that he *intended* that his questioning would result in a mistrial. In short, because the questioning was objectively reasonable, the district court's finding that the prosecutor did not intend to provoke a mistrial is certainly not clearly erroneous.

IV.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

-V-

ELLIOT NEUFELD, D.O., and JON MICKLE,

Defendants.

Case No. CR-2-94-144
JUDGE SMITH

(Filed Dec. 17, 1996)

OPINION AND ORDER

Defendants Neufeld and Mickle move to dismiss the indictments against them on double jeopardy grounds. The Court declared defendants' first trial a mistrial after the government introduced unfairly prejudicial testimony that the defendants were gay lovers. For the reasons that follow, the Court denies defendants' motion to dismiss.

I.

The government charges Dr. Elliot Neufeld and Jon Mickle with violations of the Medicare-Medicaid Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b). The Anti-Kickback statute prohibits health care providers from receiving or offering "any remuneration . . . for referring" patients to health care services for which Medicare or Medicaid pays. *Id.*

The government alleges that defendant Neufeld conspired with defendant Mickle to establish a series of "consulting agreements" with Caremark, a home infusion company. Under these agreements, Caremark allegedly

paid defendant Neufeld for referring his patients to Caremark for health care services. It also alleges that defendant Neufeld referred patients to Caremark while he was working under those consulting agreements and received remuneration for those referrals. Finally, the government alleges that defendant Neufeld violated the federal mail fraud statute, 18 U.S.C. § 1341, 1343 in executing the kickback scheme.

Defendants are gay. Throughout this case defendants have voiced their concern that issues of their sexual orientation and homosexual relationship would inflame the jury, resulting in an unfair trial.

The first grand jury indicted defendant Neufeld in September 1994. The grand jury indicted defendant Mickle in May 1995. Soon afterwards Mickle moved to dismiss his indictment for selective prosecution. He argued that the government had indicted him because of his homosexual orientation, not because of any alleged conspiracy with defendant Neufeld. The Court denied his motion.

In March 1996, defendants filed a motion in limine to exclude from trial any evidence of homosexual conduct between the defendants, fearing that severe prejudice would result. The government's response acknowledged the defendants concerns and agreed to exercise restraint on the issue of sexual orientation. In response to the defendants' motion, and based on the government's representation, the Court issued a pre-trial order which excluded evidence of specific instances of sexual conduct from trial.

The trial began on September 9, 1996. *Voir dire* lasted more than two days, during which potential anti-homosexual bias was discussed with each juror. Defense counsel vigorously objected to anyone serving on the jury who had any moral objections to homosexuality. Over defendants' objections, the Court declined to dismiss several prospective jurors who said they were morally opposed to homosexual conduct, but who strongly and credibly stated that they could be fair and impartial in this case. The Court told each such prospective juror that the defendants' homosexuality was not an issue in the case, and the government repeatedly asserted that the case was not about homosexuality.[1]

On the first day of testimony, September 16, 1996, the government elicited the following statements from its first witness, Ms. Carolyn Sipes:

> Q. [Prosecutor] Were you aware of any special relationship between Elliot Neufeld and Jon Mickle?
>
> A. [Ms. Sipes] Yes, I was.
>
> Q. [Prosecutor] How did you know about it?
>
> A. [Ms. Sipes] Jon told me.
>
> Q. [Prosecutor] What did Jon tell you?

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[1] Defendants did not hide their sexual orientation. Throughout *voir dire*, the Court and counsel informed the prospective jurors that defendants were gay. During their opening statements counsel again openly stated defendants' sexual orientation. Defendants, however, consistently drew a distinction between informing the jury that they were gay, and telling the jury about specific instances of sexual conduct, the latter being clearly inflammatory.

A. [Ms. Sipes] He told me that they had been lovers.

Trial tr. 9/16/96, p.684, ll.19-25. Defense counsel objected, and the Court overruled the objection. The prosecutor then continued his questions:

Q. [Prosecutor] Did Elliot Neufeld ever mention his relationship with Jon Mickle to you?

A. [Ms. Sipes] Yes, he did

Q. [Prosecutor] What did he say?

. . .

A. [Ms. Sipes] Elliot told me that they had been an item at one time.

Q. [Prosecutor] Did you ever witness any arguments between Elliot Neufeld and Jon Mickle?

A. [Ms. Sipes] Yes, I did.

Q. [Prosecutor] Describe them, please, for the jury.

Id. p.685, ll.4-17. Defense counsel objected again and requested a mistrial.

During the sidebar conference immediately following the testimony and in oral arguments the next day, the Court queried the government about the prejudicial testimony. The prosecutor acknowledged that he had elicited the testimony with the intention of using it as a basis for the government's theory of the case.[2] He argued that

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[2] The prosecutor explained that he hoped to elicit testimony that would lay the foundation for the government's

evidence that the defendants were gay lovers is not the same as evidence of specific instances of homosexual conduct. He contended, therefore, that the testimony did not violate the Court's pre-trial order. The Court found that the distinction was of little import. The resulting impact on the jury and unfair prejudice were the same as if specific instances of homosexual conduct had been introduced.

The Court found that the introduction of evidence that the defendants were lovers was so unfairly prejudicial that it was necessary to grant the defendants' motion for mistrial. In his explanation to the Court of the reasons for his improper questioning, the prosecutor conceded that he intended to elicit the testimony that the defendants were "lovers."

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allegation that, whenever defendant Neufeld did not get what he wanted, he threatened not to refer patients to Caremark:

> [T]he answer that I hoped to hear is: Yes, there were arguments because at one time – in fact, there were several instances – but the one in question has to do with the fact that Jon Mickle was dating Mike Federer and at that point Elliot Neufeld said: I am going to refer my patients elsewhere.
>
> It goes directly to his motivation to refer his patients to Caremark. . . . This goes directly to motive and it is very important because every time Elliot Neufeld asked for something, or every time he got angry, he threatened to refer his patients elsewhere.

Trial Tr. 9/16/96, p.686 l.5-p.687 l.7. This, in turn, would support the government's theory that defendant Neufeld referred patients to Caremark only because he expected something in return.

The defendants now move to dismiss their indictments on the basis that the government introduced the testimony in violation of the Court's pre-trial order in a deliberate attempt to goad the defense into moving for mistrial. They argue that a second trial would thus violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

II.

Under the Double Jeopardy Clause of the Fifth Amendment, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This guarantee encompasses three separate protections. A criminal defendant may not be prosecuted a second time for the same offense after a conviction; he may not be re-prosecuted for the same offense after an acquittal; and he may not be given multiple punishments for the same offense. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-07 (1984) (dictum). Jeopardy attaches as soon as the defendant is placed "in jeopardy," i.e., when the Court has impaneled and sworn the jury. *Crist v. Bretz*, 437 U.S. 28, 29 (1978).

Declaration of a mistrial falls squarely within the first two guarantees of the Double Jeopardy Clause, and a defendant cannot be retried after a mistrial unless there is a "manifest necessity" for a new trial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). When, however, the defendant himself chooses to terminate his first trial by his own motion for mistrial, the government may retry him. *Oregon v. Kennedy*, 456 U.S. 667, 673 (1981) (citing *United States v. Tateo*, 377 U.S. 463, 467 (1964)). *Kennedy*

carved out a narrow exception to this rule. It stated that, when a prosecutor acts deliberately to goad the defendant into requesting a mistrial, the Double Jeopardy Clause bars retrial. *Id.*

In the instant case, defendants contend that the government was on notice that any attempt to introduce the prohibited testimony would inevitably result in a defense motion for mistrial. In support of this contention, the defendants cite particularly: defendant Mickle's motion to dismiss for selective prosecution; defendants' motion in limine for exclusion of testimony concerning homosexual conduct;[3] the supplemental juror questionnaires; *voir dire* which repeatedly highlighted potential anti-homosexual bias;[4] and defendants' reiteration of their sensitivity to potential anti-homosexual bias on the day of trial itself. Defendants argue that the government's intentional elicitation of the prejudicial testimony, given its knowledge of the defendants' sensitivity to the issue, shows its intention to goad the defendants into requesting a mistrial.

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[3] The defendants noted that, in its response to their motion in limine, the government agreed "not to elicit testimony regarding specific instances of sexual conduct of the defendants without prior notice to defense and prior ruling by the court." Def. Memorandum in Support of Motion to Dismiss, p.10 (quoting government's letter, 3/4/96, p.2).

[4] The defendants also point out the prosecutor's repeated acknowledgements during *voir dire* that homosexuality was "not part of this case" and "not at issue in this case." Def. Memorandum in Support, p.10 (quoting Trial Tr. 9/9/96, p.183 l.22-p.184 l.1 and p.230 ll.1-4).

These facts do not support an inference of prosecutorial intent to provoke a mistrial. The Sixth Circuit has specifically refused to equate a "deliberate act" with an "intent to goad." *United States v. White*, 914 F.2d 747, 752 (6th Cir. 1990). The exception enunciated in *Kennedy* "requires a showing of more than a deliberate act – there must be a showing that the prosecutor's deliberate conduct was intended to provoke the defendant into moving for a mistrial." *Id.* Thus, showing that the prosecutor intended to commit the act itself is not enough. The defendants must show that the prosecutor specifically intended to provoke a mistrial.

The Supreme Court in *Kennedy* noted that the finding of intent calls for the trial court to make an inference from objective facts and circumstances. *Kennedy*, 456 U.S. at 675. The Court noted that the finding of intent in the context of the Double Jeopardy Clause is similar to the finding of intent in the criminal justice system. *Id.* The Sixth Circuit, relying on Justice Powell's concurrence in *Kennedy*, has identified factors to guide the court's determination of prosecutorial intent to goad a mistrial. These include a sequence of overreaching prior to the single prejudicial incident, whether the prosecutor resisted or was surprised by the defendant's motion for mistrial, and the trial court's findings concerning prosecutorial intent. *White*, 914 F.2d at 752 (citing *Kennedy*, 456 U.S. at 680 (Powell, J., concurring)).

These factors – particularly the "sequence of overreaching" inquiry – are of limited help in determining intent here because the mistrial occurred as soon as the trial began. Accordingly, the Court will examine the

"totality of the circumstances" to determine the prosecutor's intent. *See United States v. DeAndino*, 958 F.2d 146, 149 (6th Cir. 1992) (explaining that general criminal intent is proved by examining the behavior "in the totality of the circumstances").

The requirement of showing that the prosecutor intended to provoke a mistrial presents a high hurdle. Since *Kennedy*, federal courts have consistently refused [sic] infer such prosecutorial intent. *See White*, 914 F.2d at 752; *see also United States v. Perez Sanchez*, 806 F.2d 7, 7-9 (1st Cir. 1986) (government witness's reference to excluded evidence deemed good faith mistake), *cert. denied*, 480 U.S. 922 (1987); *United States v. Millan*, 17 F.3d 14, 18 (2d Cir. 1994) (unintentional failure to disclose police misconduct not an effort to goad mistrial); *Virginia v. Kelly*, 29 F.3d 145, 147 (4th Cir. 1994) (failure of prosecutor to produce exculpatory evidence not intended to goad a mistrial); *United States v. Botello*, 991 F.2d 189, 192-93 (5th Cir. 1993) (marshal's argument with juror about juror smoking marijuana not an effort to goad a mistrial), *cert. denied*, 510 U.S. 1074 (1994); *United States v. Jozwiak*, 954 F.2d 458, 460 (7th Cir.) (neophyte prosecutor's reference during opening statement to codefendants' guilty pleas not an effort to goad a mistrial), *cert. denied*, 503 U.S. 950 (1992); *United States v. Ivory*, 29 F.3d 1307, 1310-11 (8th Cir. 1994) (accidental *Brady* violation and improper comment during closing argument not intentional provocation); *United States v. Lun*, 944 F.2d 642, 645-46 (9th Cir. 1991) (failure to ask witness not to leave country before defense cross-examination not an attempt to goad a mistrial); *Greyson v. Kellam*, 937 F.2d 1409, 1415 (9th Cir. 1991) (prosecutor's reference to witness he knew would not

testify not intended to goad a mistrial); *United States v. Powell*, 982 F.2d 1422, 1429 (10th Cir. 1992) (inquiry into defendant's alleged death threats to witness not an effort to provoke a mistrial), *cert. denied*, 508 U.S. 917 (1993).

Only one reported decision – issued before *Kennedy* – has upheld a finding of an "intent to goad." *United States v. Martinez*, 667 F.2d 886, 899-90 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982). In *Martinez*, the government prosecutor admitted that the defendant had been induced into agreeing to a mistrial. The judge and prosecutors had set up the basis for the mistrial request at an ex parte meeting, unknown to the defendant or his attorney. The meeting was held because of the trial judge's concern that jurors were being intimidated in the courtroom by the behavior of spectators who were sympathetic to the defendant. There, the judge and prosecutors examined various mechanisms by which the defendant might be induced to move for a mistrial. *Id.* at 888.

Although the government eventually requested the mistrial, with the defendant's agreement, the reviewing court determined that, because the defendant had not been notified of the ex parte meeting, he had been led into agreeing to the mistrial without the benefit of all the facts. *Id.* at 888-889. *Martinez* was a pre-*Kennedy* case in which the court employed the more liberal standard of prosecutorial "bad faith conduct . . . [which] prods the defendant into requesting a mistrial." The court nonetheless found that the conduct was more than sufficient to bar retrial even if the defendant were required to show that the prosecutor intended to goad him into seeking a mistrial. *Id.* at 890.

Martinez is exceptional. It is clearly distinguishable on its facts from the case before this Court. Under circumstances much more similar to those before us in their prejudicial effect, the Eleventh Circuit held that a prosecutor's repeated use of the emotionally-charged term, "organized crime," in his opening statement, in violation of a pre-trial order, was not sufficient to bar retrial. *United States v. Dante*, 739 F.2d 547, 548 (1984). Relying on the trial court's observations of the prosecutor's actions and its evaluation of the reasons proffered by the prosecutor for his conduct, the court of appeals concluded that the necessary intent to provoke a mistrial was absent. *Id.* at 549.

The Court reaches the same conclusion here, finding no prosecutorial intent to goad the defendants into requesting a mistrial. Although the government was clearly aware of the sensitivity of the defendants, and this Court, to mention of specific homosexual conduct, it contended that the testimony elicited did not violate the Court's order.

In his explanation to the Court of the reasons for his improper questioning, the prosecutor admitted that he intended to elicit the testimony that the defendants were "lovers." However, he argued a distinction between the testimony given at trial and testimony concerning "specific instances of sexual conduct" precluded by the Court's pre-trial order.[5] The government reiterates this argument

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[5] The prosecutor argued that "[t]here was no testimony elicited and I would not elicit testimony concerning sexual acts. . . . There was no question concerning homosexual

in its memorandum in opposition to the defendants' motion to dismiss:

> In this case, government counsel had a good faith belief that evidence of the general nature of defendants' relationship did not violate the court's earlier order concerning "specific instances of sexual conduct" . . . [T]he government did not reasonably anticipate that the brief reference to the defendants' relationship would trigger a motion for mistrial.

Government's Mem. in Opposition, p. 15.

Although the Court is not persuaded by the government's argument that its questions were more concerned with "status" than with "conduct," it is nonetheless a colorable stance for the government to have adopted. After reflecting on the matter, the Court held that testimony that the defendants were lovers implicated homosexual conduct. Until that point, however, the government's asserted distinction between evidence of a homosexual relationship and evidence of specific instances of homosexual conduct was not *per se* without merit.

That the government's stance was ultimately found unpersuasive does not render it wholly implausible or an

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conduct." Trial Tr. 9/16/96 p.689 ll.21-25. *See also* Trial Tr. 9/17/96 p.17 ll.18-24:

> My understanding of specific instances of sexual conduct are on specific days, specific events and so forth. And this is the general relationship between these two codefendants who are co-conspirators. It has nothing to do with anything specific, and I am seizing on the word "specific" instances. That was the court order.

attempt to goad a mistrial. As Justice Powell noted in his concurrence in *Kennedy*, "our system *is* adversarial and vigorous advocacy is encouraged." *Kennedy*, 456 U.S. at 680 (Powell, J., concurring) (emphasis in original). Hence, the Court must be cautious in labelling courtroom conduct as an intent "to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 676. In the instant case, the Court finds that the circumstances of the incident itself, bolstered by the prosecutor's explanation for his questions, do not support an inference that the prosecutor intended to goad the defendants into requesting a mistrial.

To some extent, the determination of the prosecutor's intent here rests on the Court's evaluation of the credibility of the prosecutor's assertion that he drew a distinction between the fact of defendants' homosexual relationship and specific instances of sexual conduct. Firsthand observation of the prosecutor's conduct and his arguments, taken as a whole, lead the Court to conclude that he acted throughout the proceedings in a manner consistent with his asserted belief that the subject testimony did not violate the Court's pre-trial ruling.

The Court finds the prosecutor's explanation of the basis for his elicitation of the prejudicial testimony to be credible. Even though the distinction he drew was objectively incorrect, it is his actual subjective state of mind that is at issue here. It is clear to this Court that the prosecutor's subjective belief that such a distinction could be drawn belies the defendants' contention that he intended to goad them into moving for a mistrial.

Viewed through the filter of the prosecutor's subjective belief, many of the facts upon which defendants rely to indicate an intent to provoke a mistrial instead become further evidence of the strength of the prosecutor's belief. His actions show considerable consistency.

For example, defendants cite the prosecutor's failure to obtain an advance ruling from the Court on the admissibility of the evidence of a sexual relationship, the testimony he elicited and proposed to elicit, and his failure to urge the Court to adopt measures other than a mistrial to cure the prejudicial effect of his questions. If, however, the prosecutor believed that a valid distinction could be drawn between "relationship" questions and "specific instances" questions, he would not have needed to request an advance ruling, his questions would not have been improper, and there would have been no prejudicial effect which required curative measures.

Defendants correctly note that they need not show the prosecutor's motive to demonstrate an intent to provoke a mistrial. Def. Mem. in Support, p.6. Nevertheless, motive is often a useful tool for determining intent, and may be part of the totality of the circumstances which should be evaluated. The Court will therefore examine several possible reasons for the prosecutor's alleged intention to provoke a mistrial.

A prosecutor may try to rescue a case that is going badly by goading a mistrial. Such motivation is absent here, however, because the trial had barely begun. As the Seventh Circuit observed in a case in which mistrial was ordered as a result of improper remarks in the prosecutor's opening statement, "Scuttling a trial at dockside

poses few if any risks to the defendant's legitimate interests." *Jozwiak*, 954 F.2d at 460. In the instant case, the government had just started the presentation of testimony by its first witnesses when the defense moved for mistrial. At that point, it was much too early to determine whether its case was going well or badly. For these reasons, the motive of rescuing a losing case could not be present in the instant case.

Defendants argue that the prosecutor waited until after the defendants' opening statements to learn the theory of the defense before goading a mistrial. They maintain that the government then provoked a mistrial to gain time to prepare its response to the defense.

The Court finds this assertion implausible. Defense counsels' opening statements consisted largely of denials of the elements the government would have to prove, although the statements were not devoid of theoretical underpinnings. Defendant Mickle's counsel, for example, referred to the government as "rushing to judgment" (Trial Tr. 9/16/96, p.623 l.3), claimed "improper motive" (*Id.* p.627, ll.10-14), and intimated that there would "be some surprises" in the trial (*Id.* p.645 ll.14-15). Those surprises were not evident from opening statements, and, in fact, defense counsel admitted that it had "made no secret" of its charges against the government. *Id.* p.627 l.8.

Although defendants' opening statements were well crafted and adroitly presented, they did not divulge any acutely important information that the prosecution could have exploited only at a later trial with a different jury. The notion that the prosecutor provoked a mistrial to

learn the defendants' theory of the case is simply not credible here.

Defendants also contend that the government provoked a mistrial because it needed more time to prepare its case. Although one trial attorney was relatively new to the case, the development of the government's case had already involved several years of investigation and months of trial preparation. The defendants have offered no real evidence that the government was not sufficiently prepared for trial.

In sum, the Court finds insufficient evidence from which to infer that the prosecutor intended to provoke a mistrial when he introduced testimony that the defendants were lovers. Based on its firsthand observation of the prosecutor's conduct and demeanor, the Court finds that the prosecutor elicited the testimony out of an overzealous desire to convict. The prosecutor intentionally decided to begin the government's case with an inflammatory revelation about the defendants. The prosecutor resorted to gratuitous sensationalism to help him win the case, not to goad a mistrial.[6]

For these reasons, the Double Jeopardy Clause of the Fifth Amendment does not bar retrial of defendants Neufeld and Mickle.

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[6] Although the Court is not in the business of evaluating advocacy styles, it must wonder whether such a strategy would really have worked in any event. As a neutral observer, the Court was left wondering whether the government was using the shock value of defendants' relationship to make up for lack of substance. A jury might well have reacted to the subject testimony the same way.

III.

Based on the above, the Court **DENIES** the defendants' motion to dismiss.

The Court fully expects defendants will appeal this ruling, as is their right. If the court of appeals affirms this Court's decision, the Court will set this matter for trial to begin about four to six months after remand. If this matter is retried, the Court will exclude *all* evidence relating to sexual orientation or conduct, including evidence from which sexual orientation or conduct could reasonably be inferred. The Court would also try defendants separately.

IT IS SO ORDERED.

/s/ George O. Smith
GEORGE O. SMITH, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

-V-

ELLIOT NEUFELD, D.O., and JON MICKLE,

Defendants.

Case No. CR-2-94-144
JUDGE SMITH

(Filed Feb. 4, 1997)

ORDER

On December 17, 1996, the Court issued an opinion and order denying defendants' motion to dismiss the indictment. The defendants' motion presented a narrow issue: whether the protection against double jeopardy barred retrial after mistrial because the prosecutor intended to goad the mistrial when he elicited testimony that defendants were gay lovers. Based on its firsthand observation of the prosecutor and the totality of the circumstances, the Court found that the prosecutor did not intend to goad a mistrial, but instead elicited the testimony in an overzealous desire to convict.

Defendants now seek reconsideration of the Court's decision denying their motion to dismiss. Essentially, defendants contend that the Court was mistaken in various inferences it drew from the evidence, that it failed adequately to consider factors suggested in Sixth Circuit case law, and that there is, in fact, evidence that the prosecutor had motivation to goad a mistrial because he was unprepared for trial and/or because he wanted to

discover defendants' strategy from their opening statements. With respect to the prosecutor's alleged motivation, defendants offer purported new evidence.

The Court has carefully considered defendants' arguments and purported new evidence. The Court will stand by its decision of December 17, 1996. The Court is unpersuaded by defendants' arguments that it drew unreasonable inferences from the available evidence, or that it failed properly to apply the law.[1] Furthermore, defendants' purported new evidence of motive,[2] even if credited, does not alter this Court's firm belief – based on direct observation of the prosecutor's conduct and the totality of the circumstances – that the prosecutor did not intend to goad a mistrial.

For these reasons the Court **DENIED** defendants' motion for reconsideration.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

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[1] The Court found that some of the factors suggested in Sixth Circuit precedent were geared more for evaluation of a prosecutor's conduct in a trial that had progressed much further before the mistrial than the instant case had.

[2] It appears defendants' "new" evidence was available when they filed their motion to dismiss. This alone may be sufficient reason to deny any motion to reconsider based on such evidence.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America,

-V-

Elliot Neufeld, D.O., and
Jon Mickle

Defendants.

Case No.
CR-2-94-144
JUDGE SMITH

(Filed Sep. 17, 1996)

OPINION AND ORDER

On September 16, 1996 the government put on its first witness in this case, Carolyn Sipes, and elicited from her that the defendants were lovers. Defendants then moved for mistrial, asserting that the evidence of defendants' homosexual relationship was so unfairly prejudicial that trial before this jury cannot properly continue. After hearing the arguments of all parties, Fed. R. Crim. P. 26.3, the Court granted defendants' motion for reasons stated on the record on September 17, 1996.

Earlier in this case, the Court issued a written ruling – based in part on the government's own representations – that evidence of specific instances of homosexual conduct would be inadmissible at trial. The government argues that evidence that defendants were gay lovers is not the same as evidence of specific instances of homosexual conduct. The Court finds that the distinction is of little import. Any reasonable juror hearing that the defendants were lovers would necessarily infer that the defendants engaged in specific instances of homosexual

conduct. In other words, the same kind of unfair prejudice that evidence of specific instances would cause is also caused by saying that the defendants were lovers.

The Court understands the government's argument as to the relevance of the disputed evidence. It ostensibly lays the foundation for the government's allegation that whenever Dr. Neufeld did not get what he wanted, he threatened not to refer patients to Caremark. This, in turn, supports the government's theory that Dr. Neufeld referred patients to Caremark only because he expected something in return. Nonetheless, the government's relevancy argument misses the mark completely. The evidence may indeed be relevant, but in this instance the Court had already ruled that the danger of severe prejudice to the defendants far outweighed any probative value. Fed. R. Evid. 403.

The Court also rejects the government's characterization of the reference to defendants being lovers as "innocuous." Rather, it is something more akin to juicy gossip, and would likely stay on the jurors' minds throughout the trial.

The government further contends that introducing evidence that the defendants were homosexual lovers is no different than introducing evidence that a heterosexual couple had been lovers. The Court also rejects this argument. First, evidence of a heterosexual relationship would similarly be excluded if the danger of unfair prejudice outweighs its probative value. In addition, evidence of a heterosexual conduct does not raise the same societal prejudices that homosexual conduct seems to. *See United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988).

The Court finds disturbing that the government chose to lead off its case with an evidence that implicates homosexual conduct. It appears from the indictment that the government has many examples of instances in which Dr. Neufeld allegedly demanded one thing or another in return for the referrals, or threatened to stop referring patients to Caremark if he did not get his way. Most if not all of these other examples have nothing whatsoever to do with homosexual status or conduct. The Court finds that the government can fairly prosecute this case without making any reference whatsoever to homosexuality.

The Court agrees with counsel for all parties that it would only make matters worse to *voir dire* the jury and alternates on the impact of the disputed evidence. The Court believes that the issue of homosexuality has been so overplayed in this case that the prejudice arising from the testimony of Sipes cannot be cured by either *voir dire* or a curative instruction.

In sum, the Court finds that the introduction of evidence that the defendants were lovers is so unfairly prejudicial that it must **GRANT** defendants' motion for mistrial.

This ruling raises a number of issues. First, before selecting another jury, the parties should brief any issues regarding double jeopardy. *See Oregon v. Kennedy*, 456 U.S. 667, 673-74 (1982); *United States v. White*, 914 F.2d 747, 752 (6th Cir. 1990). Defendants shall file their briefs on this issue by **September 20, 1996**. The government shall respond by **September 24, 1996.**

If the Court finds that double jeopardy does not preclude retrial, it will begin the *voir dire* on **October 1,**

1996. The Court will create a new, shorter questionnaire for prospective jurors to fill out when they come in, and will make the completed questionnaires available to counsel. Opening statements and introduction of evidence will begin on **October 7, 1996.**

The Court will consider two additional issues. First, the Court is contemplating precluding *any* evidence relating to, or that would give rise to an inference of, the sexual orientation of the defendants, witnesses, patients or anyone else during trial. Fed. R. Evid. 403. Second, along the same lines, the Court is considering severing the trial of Dr. Neufeld from the trial of Mr. Mickle. Fed. R. Crim. P. 14.

Lastly, as a cautionary matter, the Court reminds counsel of their responsibilities under Rule 3.6 of the ABA's Model Rules of Professional Conduct, and that they should avoid any conduct or statements that could prejudice any further proceedings in this case. *See* S.D. Ohio L.R. 104; *see also* Fed. R. Crim P. 21(a).

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

97-3159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	**ORDER** (Filed Jul. 30, 1998)
ELLIOT NEUFELD, D.O., AND JON MICKLE, Defendants-Appellants.	)	

BEFORE: RYAN, DAUGHTREY, and LAY,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Hon. Donald P. Lay, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

97-3159

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

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UNITED STATES OF AMERICA,	:	CASE NO. CR-2-94-144(1)(2)
PLAINTIFF,	:	(Filed Jul. 1997)
V	:	
ELLIOT NEUFELD, D.O. AND JON MICKLE,	:	
DEFENDANTS.	:	

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TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE GEORGE C. SMITH,

UNITED STATES DISTRICT COURT,
SITTING AT COLUMBUS, OHIO,

ON TUESDAY, SEPTEMBER 17, 1996.

- - -

APPEARANCES:

MESSRS. JOHN A. MICHELICH, DAVID J. BOSLEY, AND WILLIAM BOWNE, ASSISTANT U.S. ATTORNEYS,

ON BEHALF OF THE GOVERNMENT.

MESSRS. JAMES R. STREICKER, ROGER P. SUGARMAN AND THEODORE T. POULOS,

ON BEHALF OF DEFENDANT NEUFELD.

MESSRS. EDWARD E. MCNALLY AND JEREMY D. MARGOLIS,

ON BEHALF OF DEFENDANT MICKLE.

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GEORGINA L. WELLS, FEDERAL COURT REPORTER
COMPUTERIZED TRANSCRIPTION

[p. 2] Tuesday Morning Session,
September 17, 1996.

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THE COURT: Who wants to proceed? Mr. Streicker, were you standing?

MR. STREICKER: Yes, I was, Your Honor. If the Court pleases, I wanted to bring to the Court's attention something that you probably know, Your Honor, that there was some newspaper coverage in this morning's newspaper. And what concerns me about it, in particular, is the fact that in that article, that it is mentioned that Caremark entered a plea of guilty, and that concerns me greatly. And what I would ask Your Honor to do is generally poll the jury to see if any of them have read the article.

Now, I am not aware of any TV coverage, other people may be, but as far as I know, that's all that I have seen, Your Honor. Thank you.

THE COURT: I am not aware of any either, other than this.

MR. STREICKER: Right.

THE COURT: But again, we weren't home at the time of the news.

MR. MARGOLIS: On behalf of Jon Mickle, we would join in Jim Streicker's motion, and we would ask if the Court would consider – if any juror answers

affirmatively [p. 3] – that an individual voir dire be conducted. That was the reason for Judge Doty's inquiry, too, as to Dr. Brown, was the infection of the jury with this bit of information –

THE COURT: The guilty plea?

MR. MARGOLIS: Caremark pled guilty and, plus, paid $161 million dollars in fines. The one defendant not dismissed, Dr. Brown, he had his minimal – or overturned on that basis. So, we would ask that the Court instruct the jury that if they do hear any publicity or are spoken to about this case, that they report it to the Court immediately. That precisely is what happened in the other case. A juror became aware that the jury had became infected and called it to the Court's attention.

THE COURT: Okay. Thank you. I didn't have all of that background. Do you want to do this – do the defendants want to orally argue this at this point in time and then give the government a chance to respond?

MR. MCNALLY: Which issue, Your Honor?

THE COURT: Well, on the mistrial motion?

MR. MCNALLY: Yes, Your Honor.

THE COURT: Do you want to do that?

MR. MCNALLY: Yes, Your Honor. Thank you.

THE COURT: Mr. McNally, you may proceed.

MR. MCNALLY: Thank you. Your Honor, I will be [p. 4] very brief. I just wanted to add one issue that we neglected to include in our written filing with the Court, a copy of which was provided to the government this

morning – yesterday morning. Your Honor, we provided chambers and the government with two informal documents. We call them "cheat sheets." One was a list of preliminary matters that we might want to address before trial. Some of those have been addressed. Some have not yet been addressed.

In addition, we provided a document entitled "Excluded Evidence", which was our best effort in a two-page document – which I will have marked as an exhibit, "A" through "J" was the heading on it. It was our best effort to try to condense, perhaps 20 or 30 Court orders that have been issued in this case to insure that the litigators on each side understood or had a clear view of the parameters laid down by this Court.

At the top of Page 2, labeled, "homosexual conduct between the defendants," and it specifically cites the Court order that's cited in our brief. I handed a copy to lead trial counsel for the government, Mr. Michelich. He read it. Mr. Bowne read it in my presence. I asked him: Are there any disagreements about the understandings as indicated on this informal sheet? Perhaps, we can address them here in chambers between [p. 5] ourselves and find out if we are on the same page and where we are not.

Mr. Michelich indicated he was exercising his prerogative not to tell us what the disagreements were, not tell us informally. He would save them for formal on-the-record proceedings. We, of course, didn't have an opportunity in the rush of events yesterday to address these things with the Court. But, the record should reflect that the very issue that blew up yesterday is one that we

went to great pains to alert the government to before openings and before their first witness was called.

And finally, Your Honor, I would just add this. There seems to be some confusion or disagreement on the level of semantics, and I would argue that it is not at all a level of semantics. The government's position appears to be that while they recognize that it is not okay to talk about one instance of sexual conduct of Elliot Neufeld and Jon Mickle, for instance the Bob Shevlin application, and that the Court ordered it is not okay to bring out evidence of three particular instances of conduct of Jon Mickle and Elliot Neufeld, but it is okay to tell the Jury, by classifying them as gay, but a homosexual lover implies not once or two or three but dozens of times, of an ongoing relationship or weeks or months of it. It is disingenuous to suggest that, yes, [p. 6] Your Honor, we are barred from talking about one specific conduct or example or instance of sexual conduct, but it is okay to let the jury know that there were, perhaps, dozens of instances of specific sexual conduct. Thank you, Your Honor.

THE COURT: Thank you, Mr. McNally. Mr. Poulos or Mr. Streicker, do you have anything to add?

MR. POULOS: No. We'll adopt the arguments of Mr. McNally.

THE COURT: Mr. Michelich?

MR. MICHELICH: If the Court please, I do have several points to make. First of all, whether or not defense counsel seeks to write down gratuitously on a document that he then stamps as "for discussion purposes only", not to be filed, is neither here nor there,

and we are under no obligation to discuss it with him until we verify. As Ronald Reagan said: "Trust but verify." Just because he writes it down on a piece of paper and hands it to us doesn't mean he has faithfully put down what the Court has said. We are under no obligation to discuss that.

The matter at hand involves a motion for a mistrial. The motion for mistrial is supposed to be based upon something prejudicial to the defendant, but not merely prejudicial in the sense of evidence that the [p. 7] United States will present that will prejudice them because it tends to inculpate them as guilty of a crime. The question is not prejudice, Your Honor, but the question is unfair prejudice.

Now, in this case, they have cited one or two cases that really have nothing to do with this issue because the cases they have cited – for example, the Forest case, and the Forest case really is the case that then goes back to the cites of Hernandez and Bowers cases where the testimony that was elicited in the courtroom was presumptively prejudicial because, Your Honor, it involved mentioning to the jury that the defendant had a previous criminal conviction.

And as everybody knows, you can't tell the jury that the defendant has a previous criminal conviction until he takes the stand and then only to impeach his credibility and not to try to prejudice the jury against him. So, in those cases, the testimony that was elicited is presumptively prejudicial.

In this case, we don't even have that. In this case, what we have, Your Honor, is merely that two co-

conspirators were lovers. And I ask the Court to consider if these two co-conspirators were man and woman, would that be relevant because they are co-conspirators? Of course it would.

[p. 8] The relationship between the two co-conspirators in this case is very relevant. That's why it is brought out. It is not prejudicial. I ask the Court to also think about this. How on earth after the extensive and thorough voir dire that these defense attorneys conducted with all of these jurors on the issue of homosexuality, how on earth, now, does the mere mention that the two defendants were lovers prejudice them? I remember Your Honor saying many, many times during the voir dire, well, I don't know why we are going this far into this, but if you defense attorneys wish to do this because you think you need to do that to get a fair jury in this case, go right ahead. So, I will let you question them.

So, we spent two full days questioning these jurors about their feelings of homosexuality. I think the the [sic] record should reflect that the jury was chosen with great care on this issue. These jurors indicated that no matter what their previous thoughts about the subject, they would be fair in this case. In the opening statement, Mr. McNally virtually said they were lovers because it was in his tone of voice. He said: "They were friends."

Well, Your Honor, there is no way after this voir dire and after that opening statement and after saying to this jury all along, would you be fair if you [p. 9] hear that these two defendants are homosexual? They all said:

"Yes." How that could be prejudicial, that's totally beyond me. There has been no prejudice in this case.

Now, with regard to a violation of the Court's previous order, as we understand Your Honor's order earlier, there would be no testimony with regard to sexual conduct. There will be no testimony with regard to sexual conduct. There was testimony elicited that they had a dating relationship as lovers, and for Mr. McNally to say that that somehow conjures up images of dozens and dozens of sexual liaisons, that boggles the mind.

This is not prejudicial. This is not unfairly prejudicial. It is highly relevant, and it was brought up by the defense, and the jury has been totally desensitized to this issue, and I cannot imagine why, strategically, they would want to underscore this in front of the jury by objecting and making a show of this in front of the jury. The motion for mistrial, Your Honor, should be denied. Thank you.

THE COURT: Thank you, Mr. Michelich.

MR. MCNALLY: As you know, at sidebar yesterday, Your Honor, you indicated you also wanted to explore a relationship, romantic relationship with Jon Mickle and another witness, which on the witness order is the second [p. 10] witness after Carolyn Sipes that's on the stand right now, Michael Federer. And if the government wants to make application to the Court to elicit evidence of the romantic or intimate relationship between my client and this witness, we would respectfully ask that we be given an opportunity to attempt to address that before any solicitation is made.

May I have a moment with counsel, Your Honor?

MR. POULOS: Your Honor, the brief point that I wanted to make that relates to what Mr. McNally mentioned, I believe the sequence of events, the sequence of questions that Michelich put to this witness on this subject area, if you look at the sequence of events, the sequence of questions, it suggests, I submit to the Court, the underlying motivation of putting that evidence before the jury.

Mr. Michelich first elicited evidence that Dr. Neufeld and Mr. Mickle had a sexual relationship. Right on the heels of that, he began to probe into the fact that Mr. Mickle also had a sexual relationship, apparently, during the same time that he had a sexual relationship with Dr. Neufeld, with Michael Federer. That evidence is clearly irrelevant to any issue in this case, and I suggest that the government was attempting to put before this jury exceedingly prejudicial testimony – not [p. 11] just of sexual conduct but sexual promiscuity in a sexual context. The Court should consider that in determining some issues in terms of the motivation of the reasonableness of counsel's question.

THE COURT: The discussion regarding Michael Federer was at sidebar, wasn't it?

MR. POULOS: The underlying discussion of what he began getting into was: Were you aware of an argument that he had? We know, from 3500 material, that related to Michael Federer's sexual relationship.

THE COURT: (reading) "Mr. Michelich: The question, Your Honor, is: Was there any arguments?

And the answer that I hoped to hear is: Yes, there were arguments because at one time – in fact, there were several instances – but the one in question has to do with the fact that Jon Mickle was dating Mike Federer and at that point Elliot Neufeld said: I am going to refer my patients elsewhere.

It goes directly to his motivation to refer his patients to Caremark.

Mr. Poulos: Judge, the indictment in this case alleges renumeration in the form of dollars, in the form of fax machines, not in the form of sex. He is about to elicit a lover's spat. This is so prejudicial, Your Honor.

[p. 12] Mr. Michelich: The government's theory is –

Mr. Poulos: If I may just finish?

Your Honor, whether or not Dr. Neufeld decided or threatened not to refer patients because Jon Mickle started sleeping with someone else has nothing to do with the issues in this case and it is exceedingly prejudicial" and so forth.

So, it is an issue that will have to be dealt with. Mr. Michelich?

MR. MICHELICH: Your Honor, I didn't address this issue earlier. So, I would like to do so now. As I said to the Court in the sidebar conference yesterday, the purpose is not as Mr. Poulos indicated, to somehow argue these defendants are sexually promiscuous. That would be irrelevant. The government wouldn't elicit testimony about that or make a closing argument that the evidence showed that. That's not relevant here.

But, the purpose is to show the defendant Neufeld, on frequent occasions, threatened to refer his patients elsewhere. That happened when he demanded all sorts of special treatment. For example, if you don't give me a nurse in my office, I will refer my patients elsewhere. For example, if you don't allow me to bill for collection and handling fees on all of these blood samples, I will refer them elsewhere. He had them where [p. 13] he wanted them. They knew they benefited financially from this relationship, and it goes to the conspiracy involved here.

We are not just limited to showing that Jon Mickle and Elliot Neufeld were conspirators, but there were other unindicted co-conspirators in this case. Caremark has already pled guilty to doing this sort of thing. Caremark was doing just about what Elliot Neufeld asked for. This demonstrates the intent and motivation between Elliot Neufeld's actions when he said: "I will refer my patients elsewhere." It was a threat. He knew –

THE COURT: You feel that tends to prove a conspiracy?

MR. MICHELICH: Well, he knew, Your Honor, that his patients represented a huge revenue potential to Caremark. Anyway, he was making threats to refer his patients elsewhere if he didn't get his way. That's a statement by a person that represents a huge potential revenue for a company. When he learned that Jon Mickle happened to be dating Michael Federer, that made him angry.

THE COURT: We are here in these courts to tend to prove issues by relevant evidence, and I just – I am having trouble seeing how that tends to prove that

that is [p. 14] an act in furtherance of the conspiracy, if he is using his leverage as – his business leverage, let's say, to say that I want this or I want that or I have a relationship here and this and that and so forth.

MR. MICHELICH: I am not sure that I understand.

THE COURT: I don't understand how the acts that you are referring to tends to – or are acts in furtherance of the conspiracy.

MR. MICHELICH: Are you talking about the acts meaning the relationship? I think I understand what Your Honor is saying. It is the statement of Elliot Neufeld that we are trying to get into evidence, that is that he will threaten to take his patients elsewhere. That's meaningless as to there is some reason why he made that statement. My question to the witness is did you ever hear any argument between Elliot Neufeld and Jon Mickle? The answer was "yes." We had an objection. We had a sidebar. I said I hope to elicit it from the next several questions that the argument had to do with Jon Mickle's relationship with another person.

THE COURT: What does that have to do with Caremark or the conspiracy?

MR. MICHELICH: It then gives meaning to the defendant's statement. It shows the context, or otherwise, why would he say in a vacuum "I will threaten [p. 15] to take my patients elsewhere." It was because he knew that he represented a huge revenue source to Caremark, and he could use that as leverage, even insofar as continuing

to – continuing to manipulate the behavior of Jon Mickle. That's the purpose of it, Your Honor.

MR. MCNALLY: So the record is clear, on behalf of Mr. Mickle, I would join Mr. Poulos, motion to exclude this evidence of sexual promiscuity.

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THEREUPON, a recess was taken.

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THE COURT: Mr. Michelich, there is one question that I have to you. Refer to the record on Page 21. I don't know if you have a record or not?

MR. MICHELICH: I have the page, Judge.

THE COURT: 21?

MR. MICHELICH: Yes, sir.

THE COURT: There is that discussion about the D.O. and Mr. Poulos objected, and I sustained it, and then the question that started or really started the ball rolling on this problem is: Were you aware of any special relationship between Elliot Neufeld and Jon Mickle? Yes, I was. How did you know about it? Jon told me. What did Jon tell you? And then came the answer. He told me that they had been lovers. And Mr. McNally requested a [p. 15] sidebar, and then there were some other objections.

Did you expect that answer? What answer did you expect that witness to give you?

MR. MICHELICH: That exact answer that she [sic] gave. I fully expected that, Your Honor. That was the statement of the defendant. It comes in because it is a statement of the defendant.

THE COURT: The concern that I have or the second question that I have is that you are aware of the Court's opinion and order on this matter, I would assume, referring you to the "evidence of homosexual conduct"? The one proposed stipulation, "A", the Caremark guilty plea, which was discussed, and "B" was evidence of homosexual conduct that the defendants – I will read this for the record so it is all together.

"Defendants do not object to the acknowledgement of sexual orientation or friendship between Mickle and Dr. Neufeld. Defendants, however, move in limine pursuant to Federal Rules of Evidence 401 and 403 to exclude specific instances of sexual conduct from introduction at trial. The government replies that: "It is sensitive to the issues raised by the relationship between the defendants . . . " and agrees "not to elicit testimony regarding specific instances of sexual conduct of the defendants without prior notice to defense and prior [p. 17] ruling by the Court."

The government indicates its willingess not to introduce such evidence with one exception, the Shevlin statement – which was ruled out, of course.

The Court will hold the government to its position, The Court holds specific instances of sexual conduct will be precluded from the trial."

The answer – or at least the more thought that I have put into it – the answer that was elicited by your somewhat specific question of what was the special relationship, that they had been lovers, and that that very well could have violated the Court's order, and frankly,

the agreement that we had amongst everyone as to what was fair game in this case.

MR. MICHELICH: I understand what the Court is saying, Your Honor, but I agree with what you have read from the previous court order, and specific instances of sexual conduct was not the points of that question. My understanding of specific instances of sexual conduct are on specific days, specific events and so forth. And this is the general relationship between these two codefendants who are co-conspirators. It has nothing to do with anything specific, and I am seizing on the word "specific" instances. That was the court order. I was not prepared to – nor will I – or do I know of any specific instances [p. 18] of sexual conduct between these two on a particular day or particular event, such that there would be testimony that on such and such a day that the two defendants did such and such together or anything like that.

There is a general question about their general relationship together. That's all. That's not – it is not a specific instance of sexual conduct at all.

As I have said before this morning, Your Honor, this is a relationship between two co-conspirators. It is very relevant to show their relationship, and once again, I offer the analogy if Mr. Mickle were female and Elliot Neufeld was having an affair with a codefendant who was a female, I think the relevance is clear. The only reason that the defense attorneys now are saying this is somehow prejudicial is because the two defendants are male.

But during voir dire, we went through a rather thorough questioning process to insure that the jurors

would not hold that against them. Numerous times during 19 the voir dire the defense attorneys said this: Ladies and gentlemen, you will hear that the defendants are gay. Now, no one said at that time that they – that they together had a relationship, but certainly, it leaves that open, and that certainly leaves that inference very clear that if we refer to these two defendants together as being gay, one could reasonably draw the inference that means [p. 19] they, themselves, had a relationship. I know that was not specifically questioned of the jurors, but it was said over and over again: Ladies and gentlemen, you will hear that these two defendants are gay. Will you hold that against them in any way? I think a reasonable inference is that if that question is asked, that it was meant that there was a relationship between the two defendants.

Now, Your Honor, my question of her was to specifically elicit the relationship but not a specific instance of conduct.

THE COURT: Thank you, Mr. Michelich.

MR. MICHELICH: Thank you, Your Honor.

THE COURT: I think that there is – it occurs to the Court that there seems to be quite a difference between a heterosexual relationship that might be referred to as something as sensitive as a homosexual relationship, Although they expressed, after a careful and thorough questioning of twenty minutes or more of each – of just about everyone on the panel that we ended up with, that they expressed a concern over that, many thought it was immoral, but they wouldn't hold it against them. They had friends who were homosexual and

sometimes best friends. They wouldn't hold that against them.

But, I think that there is – it would seem to me that there is, in fact, a difference, and I think [p. 20] Mr. McNally has summed it up when he referred to it as a lovers, type of thing, as a continuing relationship of homosexual acts. But, I don't know that you said it exactly that way but along those lines. That's something that the Court must consider.

There are a couple of options. one is to grant a mistrial and start all over, and two is to voir dire the jurors to see if, in fact, that relationship would – knowing that relationship, knowing that answer to that question, even though that there might be an instruction to disregard that in some fashion – I don't know quite how it would be worded, but we would figure something out.

I would like to have reaction from defense counsel and the government, of course, too, but first, from defense counsel, whose motion this is, as to if they want me to conduct a voir dire of all twelve jurors plus alternates. Mr. McNally?

MR. MCNALLY: The answer is, on behalf of defendant Mickle, it would not cure it. It would make a bad situation worse. This is a chocolate mess, the bad faith of the United States. I appreciate the fact that Mr. Michelich is new to this trial team, but we have been wrestling with this issue for more than a year.

We moved to dismiss this indictment based upon our absolute belief – we are going to do our best to show [p. 21] this jury, if we have our chance, that our client was

indicted because of his sexual status, because of the bias by the United States government and the agents who were investigating the case. They could not have known better that the sexual relationship – not friendship – but the sexual relationship between these two health care workers was out of bounds, and we were sandbagged. We were sandbagged in opening and sandbagged with the first witness out of the box in direct violation of Court order, and the only cure on the whole record of voir dire and what happened yesterday would be a mistrial.

The bringing in of these sixteen jurors and focusing more and more on the homosexual conduct between these two men would only make this even worse than it already is. Thank you.

THE COURT: Mr. Poulos?

MR. POULOS: We adopt all of those arguments, but the only thing that I want to add is, I think the Court can take notice that the objections Mr. McNally made and I made three questions later were strenuous objections. It is before the jury, and obviously, an emotional issue. I think that it is firmly implanted, that answer, in these jurors, minds. Voir dire of the jury would tend to highlight that, everything that happened yesterday. The emphasis on the jury in voir [p. 22] dire, this had to sink in so deeply, that I don't believe that there can be any cure for what the government did here.

THE COURT: Mr. Michelich?

MR. MICHELICH: Your Honor, it is absolutely incredible that Mr. McNally would stand here after all that has happened in this case and claim he is

sandbagged by the issue that he brought up repeatedly in many, many months. That cannot be the case.

The Court's order was to stay away from specific instances of sexual conduct. I am reminded by co-counsel – and I overlooked this – that there, in fact, was specific instances of sexual conduct. For example, there is evidence that Mr. Mickle and Dr. Neufeld took a trip to Atlanta together and shared a hotel room on a business trip. We had witnesses who told us about that. That's the sort of specific instances that I believe Your Honor's order forbade us from eliciting testimony about.

It is not the general, quite frankly, the very innocuous relationship between these two defendants that is – that is at issue here but those specific instances of conduct. And there may be others, but that's the one illustration that comes to mind. The government would not elicit testimony about that, but with regard to the general relationship between the two, it is very relevant. [p. 23] It does not violate the Court's order. The jury cannot be prejudiced.

So, Your Honor, the motion – first of all, the motion should be denied, but it seems to me an exercise of futility to voir dire them specifically on this issue because all that would accomplish, it seems to me, is to further emphasize this issue in their minds, and there was – the record will show that there was – there was the one answer that has caused all of this argument this morning. The witness said that Jon Mickle told me that they had been lovers. She even used the past tense of that, that they had been lovers, and that's the only statement that somehow, now, is exaggerated – not only to prejudice but

unfair prejudice. It simply is a statement made by the defendant Mickle himself to the witness that he and the other codefendant and co-conspirator had been lovers, period.

How more innocuous can you get with regard to the sensitivity to this issue? And the government does not – did not belabor the point. We don't intend to belabor the point, but it is relevant to show the relationship between the two co-conspirators.

So, I think to do anything at all with regard to this issue in front of the jury would only tend to enhance whatever pressure – or excuse me – whatever prejudice [p. 24] that these attorneys have talked about. We should leave well enough alone and just proceed.

THE COURT: Thank you. We'll be in recess until 11:15.

THE CLERK: Please rise. This court stands in recess.

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THEREUPON, a recess was taken.

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MR. MICHELICH: Your Honor, if I may, I wanted the record to reflect that during the recess, that I phoned the Court's law clerk and offered, if the Court wished, further authority from the government on this issue, to provide that and requested, if the Court wishes to review it, that we would ask for an opportunity to provide that, we would be willing to do so, if the Court requires.

THE COURT: I don't believe that will be required. Thank you very much for that generous offer.

Yesterday afternoon the government put on its first witness in this case, and elicited from this witness that the defendants were lovers. Defendants then moved for mistrial, asserting that the evidence of defendants homosexual relationship was so unfairly prejudicial that trial before this jury could not properly continue.

[p. 25] Earlier in this case, the Court ruled, based in part on the government's own representations that evidence of specific instances of homosexual conduct would be inadmissible at trial. The government argues that evidence that defendants were gay lovers is not the same as evidence of specific instances of homosexual conduct. The Court finds that the distinction is of little import. Any reasonable juror, hearing that the defendants were lovers, would necessarily infer that the defendants engaged in specific instances of homosexual conduct. In other words, the same kind of unfair prejudice that evidence of specific instances would cause is also caused by saying that the defendants were lovers.

The Court understands the government's argument as to the relevance of the disputed evidence. It lays the foundation for the government's allegation that whenever Dr. Neufeld did not get what he wanted, he threatened not to refer patients to Caremark. This, in turn, supports the government's theory that Dr. Neufeld referred patients to Caremark only because he expected something in return. Nonetheless, the government's relevancy argument misses the mark completely. The evidence may indeed be relevant, but in this instance, the

Court had already ruled that the danger of severe prejudice to the defendants far outweighed any probative value.

[p. 26] Indeed, it appears from the indictment that the government has many examples of instances in which Dr. Neufeld allegedly demanded one thing or another in return for the referrals, or threatened to stop referring patients to Caremark if he did not get his way. Most, if not all of these other examples, have nothing whatsoever to do with homosexual status or conduct. The Court finds disturbing the fact the government chose to lead off its case with an example that implicates homosexual conduct.

The Court agrees with counsel for all parties that it would only make matters worse to voir dire the jury and alternates on the impact of the evidence. I honestly believe that the whole issue of homosexuality has been so overplayed in this case, that the prejudice arising from the testimony of Sipes cannot be cured by either voir dire or a curative instruction. The Court rejects the government's characterization of the reference to defendants being lovers as "innocuous." Rather, it is something more akin to juicy gossip and would likely stay on the jurors' minds throughout the trial.

In sum, the Court finds that the introduction of evidence that the defendants are lovers is so unfairly prejudicial, that it must grant defendants' motion for mistrial.

In light of this ruling, we must now address a [p. 27] number of issues. First, before we go on to pick another jury, the Court would like the parties to quickly brief any

issues regarding double jeopardy. I would like the defendants' briefs on this issue by the end of this week. The government may respond by next Tuesday.

If the Court finds that double jeopardy does not preclude retrial, we'll make arrangements to pick a new jury. The Court will make up a new, shorter questionnaire for prospective jurors to fill out when they come in.

The Court will set the trial for October 1 to select a jury and with evidence beginning on October 7th of 1996.

Two other issues I will consider are as follows. I haven't made up my mind on this, but I am considering precluding any evidence of homosexuality. Second, along the same lines, I am considering severing the trial of Dr. Neufeld from the trial of Mr. Mickle. I don't want arguments on that now, but I want you to be thinking about that and make your thoughts known to the Court in writing,

Now, lastly, very, very importantly, as a cautionary matter – and we have already had a motion-discussion on this because of the publicity this morning, and I am not being critical of publicity, but only that it is a reality in this particular case. The Court reminds counsel of their responsibilities under Rule [p. 28] 3.6 of the Code of Professional Conduct, that they should avoid any conduct or statements that could prejudice any further proceedings in this case. October 1 is just only around the corner, and we are going into the next month, so we get a fresh batch of jurors for this case. And I can't underscore that anymore than I have. You know what you need to do to act professionally, and I would expect that from you and nothing less. Any comments?

MR. MCNALLY: Not from defendant Mickle, Your Honor. Thank you.

MR. STREICKER: Not from Dr. Neufeld, Your Honor.

MR. MICHELICH: None from the government except the government is concerned that the Court may be referring to a specific report that one of the attorneys in this case has spoken with the press? Is that a correct impression?

THE COURT: No, no.

MR. MICHELICH: All right.

THE COURT: My concern was that – and it is a public record – is the Caremark guilty plea, but that's a matter of public record. It took place here. I was the judge. I am not being critical of anyone.

MR. MICHELICH: We were unaware that any counsel had spoken with the press, but we did see the press in the [p. 29] courtroom yesterday, and I think that they may have had some conversation with defense counsel – but certainly not with government counsel.

THE COURT: I would certainly like to proceed with caution because we are on the verge of another trial in this case. We can go on and on, you know, with trying to handle matters like this. And at some point, if it continues on and on, we may have to go into a change of venue or something more serious, but hopefully, that won't happen. And if everyone follows their own professional conduct appropriately, why then, we won't have any problem.

So, does everyone understand? Okay, thank you.

THE CLERK: Court is adjourned.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

-V-

ELLIOT NEUFELD, D.O., and JON MICKLE

Case No. CR-2-94-144
JUDGE SMITH

(Filed Jun. 26, 1996)

OPINION AND ORDER

This matter is before the Court on Defendants' omnibus motion *in limine*. As this motion elicits rulings on various topics the Court will respond *seriatim*.

I. Proposed Stipulations

As part of an effort to manage this case and pare down the length of trial, the Court has expressed repeatedly its desire that the parties confer and stipulate to as much as possible. The Court is sorely disappointed that the parties could not agree to even *one* stipulation when, after reading the correspondence between the parties and hearing their representations at conferences, there is likely much, at least in principle, to which they agree. Defendants have moved *in limine* to exclude the evidence to which the Government has failed to enter a stipulation.

A. Caremark Guilty Plea

The Government has agreed that evidence of Caremark's guilty plea is not "admissible in the government's case-in-chief as affirmative evidence to prove the defendant's guilt," but declines to enter a stipulation "because

we cannot predict whether or not it may become relevant for any other purpose . . . " *See* Def. Mot. Ex. 5 (3/4/96 letter to Defendants).

The Court accepts the Government's position and tentatively **Holds** that evidence of Caremark's guilty plea to one count of mail fraud in violation of 18 U.S.C. § 1341, in Case No. CR-2-95-86, and the corresponding terms of settlement will be precluded from trial. Should the Government decide to refer to Caremark's prior plea, the Government shall first ask to approach the bench to obtain a ruling on admissibility before making any reference to the guilty plea.[1]

B. Evidence of Homosexual Conduct

Defendants do not object to the acknowledgement of sexual orientation or the friendship between Defendants Mickle and Dr. Neufeld. Defendants, however, move *in limine* pursuant to Fed. R. Evid. 401 and 403 to exclude specific instances of sexual conduct from introduction at trial. The Government replies that it "is sensitive to the issues raised by the relationship between the defendants . . . " and agrees "not to elicit testimony regarding specific instances of sexual conduct of the defendants without prior notice to defense and prior ruling by the court." *See* Def. Mot. Ex. 5 (3/4/96 letter to Defendants).

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[1] As the proponent of such evidence, the Government should be prepared to articulate succinctly the legal basis for admissibility.

The Government indicates its willingness not to introduce such evidence with one exception,[2] and the Court will hold the Government to its position.

The Court **Holds** that specific instances of sexual conduct will be precluded from trial.

C. Protropin/Healthquest/Redispensing of Medicine/Caremark's J.A.C.H.L. Accreditation/Caremark Reimbursement Practices/Character Evidence

According to Defendants, the parties have agreed to exclude the aforementioned topics from trial. *See* Def. Mot. at pp.7-8. The Court hereby **Holds** that such evidence will be precluded from trial. This ruling may be modified upon a showing of good cause by the Government.

II.

The remainder of Defendants' omnibus motion *in limine* addresses topics which are the subject of dispute between the parties: evidence of homosexual conduct between Defendants; evidence relating to Defendant Dr. Neufeld's treatment decisions; evidence of double-billing by Defendant Dr. Neufeld and/or Caremark; and evidence relating to false log entries. The purpose of these rulings is to "allow[] the parties to consider the court's

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[2] This evidence, "the Shevlin statement," will be addressed *infra*.

ruling in formulating their trial strategy." *United States v. Yannott*, 42 F.3d 999, 1007 (6th Cir. 1994).

A. Evidence of Defendants' Homosexual Conduct

Defendants move *in limine* pursuant to Fed. R. Evid. 401 and 403 to exclude evidence of alleged homosexual conduct between Defendants. Defendants particularly object to hearsay statements made by Robert Shevlin, a former Caremark employee. Shevlin has stated to investigators that he was told by Defendant Mickle that "Mickle only had to sleep with Neufeld on three occasions before Neufeld signed a contract with [Caremark] to refer his patients to the [Caremark Connection]." *See* FBI 302 Statement of Robert Shevlin (1/12/94) at p.2 (attached as Def. Ex. 6). Defendants contend that such evidence is irrelevant to show that Dr. Neufeld's contracts with Caremark were a subterfuge for illegal kickbacks. Defendants further contend that any relevance is substantially outweighed by the danger of unfair prejudice.

The Government argues that this sexual conduct directly facilitated a crime, and relates to proof of the offense, the "knowing and willful" nature of Defendant Mickle's actions. *See* 42 U.S.C. § 1320a-7b(b); *United States v. Neufeld*, 908 F. Supp. 491, 497 (S.D. Ohio 1995). As indicia of intent, the Government contends that such evidence is relevant and that its relevance is not substantially outweighed by any danger of unfair prejudice under Fed. R. Evid. 403.

The Court first notes that while evidence of sexual conduct is inadmissible to impeach the character of a witness, *see Conde v. Velsicol Chemical Corp.*, 804 F. Supp.

972, 985 (S.D. Ohio 1992) (Smith, J.), *aff'd*, 24 F.3d 809 (6th Cir. 1994), such evidence may be admissible if it addresses an element of the charged offense. *See, e.g., United States v. Hart*, 70 F. 3d 854, 860 (6th. Cir. 1995). The Court considers sexual orientation irrelevant to this or any other matter, but will not exclude relevant evidence simply because it resounds in homosexuality, or has an air of scandal.

While sexual acts are not a form of remuneration in this alleged conspiracy, the indictment does charge that "[d]uring the course of his employment with Caremark defendant Mickle was responsible for helping to recruit defendant Neufeld as a patient referral source." *See* Indictment at ¶ 9. The actions of Defendant Mickle leading up to the consummation of the indicted conspiracy may be important to the Government's case-in-chief. In this regard, the Shevlin statement is relevant under Fed. R. Evid. 401.

Surprisingly, Defendants themselves make the most damning admission about the relevance of Mickle's alleged statement to Shevlin. In their reply, Defendants contend:

> On its face, Mickle's alleged statement expressly and directly implicates Dr. Neufeld in a conspiracy to refer his patients to Caremark in return for payments under the contracts.

Def. Reply at p.7. The Court cannot imagine a more cogent argument for the relevance of Shevlin's testimony on this subject.

Only Fed. R. Evid. 403 and the danger of unfair prejudice could preclude admission. The Court will not

reach this analysis, however, finding that this evidence consists of impermissible hearsay.

The Government suggests, somewhat obliquely, that Shevlin's statement is admissible as a coconspirator statement under Fed. R. Evid. 801(d)(2)(E). *See* Gov. Resp. at pp. 2, 4, 7. Defendants argue that the statement does not satisfy the "in furtherance" requirement of Rule 801(d)(2)(E).[3] The Court agrees.[4]

Fed. R. Evid. 801(d)(2)(E) provides: "a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy" is not hearsay. To introduce a statement under Rule 801(d)(2)(E), the government must prove by a preponderance of the evidence: "(1) that a conspiracy existed, (2) that the defendant was a member of the conspiracy and (3) that the coconspirator's statements were made in furtherance of the conspiracy." *United States v. Pierce*, 62 F. 3d 818, 827 (6th Cir.), *cert. denied*, 116 S. Ct. 965 (1995).

"A statement is made 'in furtherance of' the conspiracy if it was intended to promote the conspiratorial objectives." *United States v. Hitow*, 889 F.2d 1573, 1581 (6th Cir. 1989). The statement must be intended to further the conspiracy's common objectives or set in motion transactions integral to the conspiracy. *See United States v. Yarbrough*, 852 F.2d 1522, 1535 (9th Cir.), *cert. denied*, 488 U.S.

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[3] Defendants also point out that the government failed to disclose the statement as a coconspirator statement as required by the Court. This alone would justify the Court's exclusion.

[4] The Court will address the admissibility of other purported coconspirator statements in a separate ruling.

866 (1988). Mere conversations, narrative declarations, and idle chatter among coconspirators are usually not "in furtherance" of the conspiracy. *Id.*; *United States v. Santos*, 20 F.3d 280, 286 (7th Cir. 1994); *United States v. Roberts*, 14 F.3d 502, 514-15 (10th Cir. 1993).

There can be no doubt that the Government offers Shevlin's hearsay for the truth of the matter asserted.[5] Shevlin's anticipated testimony is, therefore, within the definition of hearsay unless it falls within one of the exception [sic] of Fed. R. Evid. 801(d). Insofar as the government seeks to admit the statement as one made by a coconspirator under Rule 801(d)(2)(E), its attempt fails because, in context, there is no factual basis from which to infer that the statement was made in furtherance of the alleged conspiracy.

The Court could supply for the Government some implausible basis for the proposition that the alleged statement was made in furtherance of the conspiracy. Such arguments, however, would necessarily rest on sheer speculation. Nothing in the voluminous material the Government offers suggests that the statement could have been intended in any way to further the aims or goals of the alleged conspiracy. In context, it is a nurse manager bragging about past sexual exploits to a former

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[5] The government says it of fears the statement to show Mickle's intent or state of mind – *verba sunt indices animi*. Nonetheless, the disputed statement reveals Mickle's state of mind only *vis-a-vis* the truth of the statement. That is, if the statement was a fabrication by Mickle, then it is not in any manner probative of the alleged conspiracy or Mickle's state of mind.

delivery driver and coworker. As such, Mickle's alleged statement is mere idle chatter, not the statement of a coconspirator in furtherance of the conspiracy. *See United States v. Darden*, 70 F.3d 1507, 1529-30 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 (1996). The Court concludes that the Government has failed to satisfy its burden of showing that the alleged statement was made in furtherance of the conspiracy. The Court therefore **Grants** Defendants' motion and **Holds** that Shevlin's testimony on this subject will be precluded from trial.[6]

B. Evidence Regarding the Quality and Medical Necessity of Dr. Neufeld's Treatment Decisions

Defendants move *in limine* pursuant to Fed. R. Evid. 401 and 403 to exclude evidence regarding the quality and medical necessity of Dr. Neufeld's treatment decisions, as well as "negative perceptions" of Dr. Neufeld's "competence and abilities," *see* Def. Mot. at p.16. Defendants contend that to allow admission of such evidence would result in unfair prejudice and "necessitate a mini-malpractice trial that could potentially double the length of these proceedings, require the testimony of a body of expert witnesses, and waste the Court and the parties' time and resources." *See* Def. Mot. at p.16.

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[6] Even if the statement satisfied Rule 801(d)(2) and survived analysis under Fed. R. Evid. 403, it would nonetheless likely be excluded as violative of Neufeld's Sixth Amendment confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968). *See United States v. Sherlin*, 67 F.3d 1208, 1215 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996).

The Government has admitted readily that this is not a medical malpractice case, *see* Def. Mot. Ex. 2 (7/26/95 Tran. at pp.20-24), but nonetheless proposes admission of three "treatment" decisions: (1) Dr. Neufeld's alleged referral of patients on the heels of reports by Defendant Mickle that "business was slow at the Columbus Caremark Connection"; (2) Dr. Neufeld's alleged interest in Caremark's profits from his patients; and (3) Dr. Neufeld's alleged interest in how many patients other physicians referred. *See* Gov. Resp. at p. 10. The Government contends that these actions are probative of an intent to solicit remuneration for the referral of patients.

The Court is weary of the potential confusion of issues, especially given the Government's earlier assurances that medical malpractice would have no place in this trial. No matter how the Government describes the allegations excerpted above, particularly the first allegation, they clearly place at issue the medical judgment of Dr. Neufeld. Nonetheless, these incidents, should they be borne out at trial, would be relevant to show the existence and maintenance of a conspiracy to solicit and receive remuneration for the referral of patients. Moreover, as the Government does not seek to introduce evidence of direct misdiagnosis, the Court finds no danger of unfair prejudice to Dr. Neufeld.

Dr. Neufeld's alleged interest in referrals as a function of financial compensation as well as the timing of referrals provides strong circumstantial evidence in support of the charged conspiracy. The Court therefore **Denies** Defendants' motion and **Holds** that these three lines of evidence, as set out above and subject to an

appropriate limiting instruction regarding medical malpractice, will be allowed at trial.

Finally, "negative perceptions" of Dr. Neufeld's "competence and abilities," *see* Def. Mot. at p.16, are not relevant to this trial. The Government does not appear to contest this portion of Defendants, motion, *see* Def. Reply at p.14, and the Court **Holds** that such evidence will be precluded from trial under Fed. R. Evid. 401 and 403.

C. Evidence of Double Billing by Caremark and/or Dr. Neufeld

Defendants next move *in limine* to exclude evidence of duplicitive billing by Caremark and/or Dr. Neufeld.[7] According to the Caremark consulting agreement, Dr. Neufeld explicitly agreed not to seek additional remuneration for services provided under the consulting agreement. *See* Gov. Omnibus Ex. 7 ("Quality Service Agreement"). In other words, as a consultant, Dr. Neufeld was not permitted to bill the same service to both Caremark *and* a third party (the patient or the patient's insurer).

The Government anticipates that Dr. Neufeld will argue at trial that Caremark paid him at a fair market rate of compensation for the services he rendered.[8] The

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[7] The motion, response and reply each appear to contemplate different varieties of "double billing." In the event that this ruling does not address every concern, the parties shall seek a clarification prior to introduction of any such evidence.

[8] Presumably, this would place Dr. Neufeld within the "Personal Services and Management Contract" safe harbor provisions of 42 C.F.R. § 1001.952(d).

Government intends to offer evidence of double billing – Dr. Neufeld charging both Caremark and his patients (or their insurers) for the same service. Under the Government's theory, this duplicitive billing will prove in part the alleged disparity between services provided by Dr. Neufeld and remuneration made by Caremark, and therefore the absence of a fair market rate of compensation.

The Court disagrees. The safe harbor provision speaks in terms of "aggregate compensation paid" by the firm to the consultant. *See* 42 C.F.R. § 1001.952(d)(5). The safe harbor therefore addresses the agency agreement apart from the independent actions taken by a consultant. Certainly the safe harbor does not anticipate fair market value being affected by unilateral actions taken by either the consulting firm or the consultant.

Whether or not Dr. Neufeld was skimming off the top of these consulting agreements is therefore irrelevant in determining compliance with the safe harbor, and its admission would be unfairly prejudicial. Such evidence would establish that Dr. Neufeld was involved in fraudulent billing, but would not make any more certain Dr. Neufeld's compliance with the safe harbor or the existence of a conspiracy to solicit remuneration for referrals. The Court **Holds** that such evidence will be precluded from trial.

In reply, Defendants appear to raise an additional and distinct issue. While Defendants do not object to evidence that Dr. Neufeld was allowed to bill a "handling fee" for blood draws performed by Caremark nurses, as specifically alleged in the indictment, they do object to evidence that Caremark billed payors for the same blood

draws. Defendants assert that "[s]uch evidence would only establish that Caremark improperly caused a third-party payor to pay twice for a single service," *see* Def. Reply at p.15, and move to exclude under Fed. R. Evid. 401, 403.

The Government will likely attempt to show that the deviation from "Caremark's normal practice" in this regard formed an enticement for Dr. Neufeld's alleged referral of patients. *See* Gov. Resp. at p. 11; Indictment at ¶ 19. The relevance of this alleged "pass-through" therefore lies in the resulting financial benefit bestowed on Dr. Neufeld. Whether or not Caremark was separately compensated for the service is irrelevant, and in any event, unfairly prejudicial to Dr. Neufeld in comparison to any slight probative value. The Court **Holds** that testimony concerning Caremark's compensation for blood draws will be precluded from trial.

D. Evidence Related to False Entries in the Log or Invoices

Finally, Defendants move *in limine* to exclude evidence related to false entries in the log or invoices. Under the terms of the consulting arrangement between Caremark and Dr. Neufeld, Dr. Neufeld was required to document the services he provided under contract. *See* Gov. Omnibus Ex. 8-12 ("Consulting Agreements"). The Government contends that certain entries of the log and invoices were false and intends to elicit testimony concerning the veracity of the entries at trial. The Government asserts that "[t]he false Neufeld log entries and invoices were essential to disguising the true nature of

the agreements between Neufeld and Caremark." *See* Gov. Resp. at p.16.

Defendants move to exclude this evidence, arguing that the falsity of the log entries is relevant only if Caremark personnel were aware of or participated in the preparation of false entries. Otherwise, Defendants contend, false log entries would show that Dr. Neufeld was defrauding Caremark, rather than disguising the alleged receipt of kickbacks. Defendants seek an order excluding the evidence as Defendants are "not aware of any evidence which establishes such knowledge [by Caremark personnel] – even by the preponderance standard which governs the Court's determination under Rule 104(b)."[9] *See* Def. Mot. at p.23.

Defendants are correct in their assertion that evidence supporting the falsity of the log entries is relevant only in the event that Caremark personnel knew of or participated in the creation of the fraudulent entries. The Court, however, will not exclude this line of evidence without allowing the Government an opportunity to lay a proper foundation for such evidence. The Court **Holds** that evidence concerning purportedly false entries may be admitted only upon a showing of Caremark's knowledge, through its agents, that the log entries did not fairly

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[9] Federal Rule of Evidence 104(b) provides in relevant part: Relevancy conditioned on fact. – When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

represent the services rendered under contract by Dr. Neufeld.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT